INTERNATIONAL ANTI-BRIBERY AND FAIR COMPETITION ACT OF 1998

HEARING

BEFORE THE

SUBCOMMITTEE ON
FINANCE AND HAZARDOUS MATERIALS

OF THE

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THE INTERNATIONAL ANTI-BRIBERY AND FAIR COMPETITION ACT OF 1998

THURSDAY, SEPTEMBER 10, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met at 10:40 a.m. in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Gillmor, Deal, White, Wilson, Bliley (ex officio), Manton, Sawyer, DeGette, Markey, and Dingell (ex officio).

Staff present: Edward Hearst, majority counsel; Linda Dallas Rich, majority counsel; Cliff Riccio, legislative clerk; Bruce M. Gwinn, minority professional staff member; Consuela M. Washington, minority counsel; and Andrew W. Levin, minority counsel.

Mr. OXLEY. The committee will come to order.

The committee is holding this hearing today on the International Anti-Bribery and Fair Competition Act of 1998, which I have introduced, along with Chairman Bliley, before the August recess. Congressmen Markey, Greenwood, Gillmor and Duetsch have joined us as cosponsors. This is an appropriate bill for the Commerce Committee to handle, and I would like to thank the Chairman for his leadership in making the committee the key player on this issue.

American business and American workers, the most productive in the world, are prime beneficiaries of free and open markets overseas. But to take advantage of the benefits of free trade, the business victory has to go to the best competitor. Unfortunately that has often not been the case. All to often overseas contracts have been won by those offering payments under the table rather than the best deal on the table.

H.R. 4353 is designed to help change all that. The United States and dedicated officials in our government, both Republicans and Democrats alike, have worked hard to make this happen. The result of their efforts was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The Convention, if ratified, implemented and enforced by the other OECD member nations, will go a long way to leveling the playing field. America has the world's strongest anti-bribery laws and a powerful Justice Department to enforce them. The problem is that our competitors have much looser rules and enforcement mechanisms against bribery.

I am pleased to note the support of the SEC for the securities law provisions of this legislation, which are necessary for full implementation of the Convention. The SEC has expertise and access to corporate records critical to effectively enforcing the Nation's anti-bribery laws. This committee, of course, works closely with the Commission on a myriad of issues, and we thank them for their contributions on this matter. I welcome Paul Gerlach of the Commission staff, who will speak to these issues in greater detail.

I am also pleased to welcome Andrew Pincus, General Counsel of the Department of Commerce, to the committee. Secretary Daley has taken the lead in the administration's foreign anti-corruption efforts, and has done an excellent job, by the way. Mr. Pincus appears on behalf of the Secretary today.

Transparency and openness are keys to free competition. The more fair the competitive environment, the better our companies will do. It is also better for the countries involved. Recent events in Asia show us that a lack of transparency can lead to market distortions and inefficiencies with negative results for national economies and individual citizens.

This Convention will not end bribery worldwide, and I think we all understand that, but it is an important step forward in America's effort to lead the world to a more open, market-based system. And may I add parenthetically, we have come a long way since dealing with the Foreign Corrupt Practices Act back many years ago when I first joined this committee, and it's owed in no small part to the leadership of Secretary Daley, Chairman Levitt and others who have worked very diligently on this issue.

Nevertheless, we should all keep in mind that it is one thing to have nations agree to adopt this Convention and another to have them implement and enforce it. To date, no nation has fully ratified this agreement, which was reached last December. It is the administration's view that the United States should act first in order to help convince other nations to implement the Convention, and I agree wholeheartedly.

However, to make sure other nations follow our lead, Chairman Bliley and I have added a provision which requires the administration to monitor and report to this committee on the progress other nations are making in putting their own laws into place.

We also have added a provision designed to reduce and eliminate the privileges and immunities of the intergovernmental satellite organizations. The Anti-Bribery Convention is intended to promote openness and transparency with respect to international business practices. With their privileges and immunities, the intergovernmental satellite organizations can violate competition laws behind closed doors without fear of discovery or penalty.

H.R. 4353 will make how they do business more transparent and will bring us closer to the point where no competitor is above the law. This will help create a more level playing field to the benefit of the American satellite industry, its workers and consumers of satellite services worldwide. Our bill also makes sure bribery of anti-competitively commercialized international satellite organizations won't be outside the scope of the FCPA. A pro-competitive privatization of these organizations is the best policy for all.

Just as free trade benefits our innovative, vibrant Nation, so will world markets free of corruption. While it may be a very long time before overseas bribery is a thing of the past, we are indeed making progress.

I would like to thank our witnesses for joining us today, and we look forward to your testimony.

This ends the statement of the Chair. I now turn to the ranking member, the gentleman from New York, Mr. Manton.

Mr. MANTON. Thank you, Mr. Chairman, for holding this hearing today on legislation you and Chairman Bliley, along with others, have introduced to combat international bribery and corruption.

Clearly, the United States is the leader amongst industrialized nations in this area. We are the only Nation that has banned the bribing of foreign officials, thanks to the Foreign Corrupt Practices Act of 1977. It is surprising to me that while our country actively discourages such behavior, other countries such as Germany appear to actually encourage it through their tax codes.

Mr. Chairman, while the clandestine nature of corruption makes it impossible to estimate its full magnitude and impact, its detrimental effect on economies and societies is evident. Corruption distorts the allocation of resources, undermines fair competition in the marketplace, hurts economic development, erodes confidence in political systems and fosters organized crime. I agree with my colleagues that the entire international community should actively combat corrupt practices in international transactions.

The legislation before us today, the International Anti-Bribery and Fair Competition Act, contains changes to our laws necessary to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. While setting forth a standard for effective national laws to criminalize bribery of foreign public officials in international business transactions, this Convention also establishes a basis for effective international judicial cooperation. By fighting bribery overseas, American companies, which are the most competitive and productive in the world, will benefit from fair and open competition.

Mr. Chairman, I believe today's hearing will be useful to help us gather information needed to proceed in crafting such implementing legislation.

Again, I thank you for holding this hearing and I look forward to the testimony of the distinguished witnesses, Mr. Gerlach and Mr. Pincus. Thank you.

Mr. OXLEY. I thank the gentleman.

The Chair now recognizes the gentleman from Virginia, the Chairman of the Commerce Committee, Mr. Bliley.

Chairman BLILEY. Thank you, Mr. Chairman. I would like to thank you for holding this hearing today. You have been a leader on international issues in general and a strong advocate for free trade in particular. The legislation which you and I have cosponsored, and which the committee is considering today, is designed to open markets overseas by implementing an international convention which I think we both hope will go a long way toward promoting transparency and fair competition.

Our legislation, the International Anti-Bribery and Fair Competition Act of 1998, contains the changes to our laws necessary to im-

plement the OECD Convention on Combating Bribery of Foreign Public Officials.

I believe that this Convention will help fight bribery and level the playing field for American companies. I congratulate our government officials, and Secretary Daley in particular, for their role in negotiating this important agreement. It has been achieved as a result of the hard work of officials in both Republican and Democratic administrations, and was worth the wait.

Our Nation already has one of the strongest anti-bribery laws in the world. American business claims that this puts them at a disadvantage since other nations do not have strong laws against bribery. Some even make it tax deductible.

The critical issue with respect to the Convention is convincing other nations to put their no-longer tax deductible money where their mouth is.

It is my understanding that the administration believes that we need to lead the way in order to get others to follow. To date, only Bulgaria has ratified the Convention and even the Bulgarians have not completed the process by depositing their documents with the OECD.

It is my hope in introducing this legislation that we will be taking an important step forward in creating a fairer and more open international business environment. American business and workers, the most competitive and productive in the world, will be the biggest beneficiaries of fair and open competition.

Still, we need to look carefully to make sure other nations live up to their obligations. That is why we have added a reporting requirement to the legislation. Our bill will require the administration to report annually, beginning on July 1 of next year, on other nations' implementation and enforcement efforts.

Thus the bill before us today eliminates barriers to competition resulting from both foreign corruption as well as from unfair and inappropriate privileges and immunities.

American companies have been at a disadvantage for far too long due to lax bribery laws in other nations. We need to work to bring other nations up to an equal standard with our own.

Merit, not bribery, should determine who wins business and the resulting jobs. Overseas contracts should go to the best competitors, not the biggest bribers.

I would like to thank our witnesses for appearing here today and appreciate the time and effort they and their colleagues have devoted to this vital issue.

Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman.

Does the gentlelady from Colorado have an opening statement?

Ms. DEGETTE. No, Mr. Chairman.

Mr. OXLEY. We now turn to our newest member of the panel, the gentlelady from New Mexico, Mrs. Wilson. I think it's your first hearing on the subcommittee, and let me say, first of all, that we welcome you. For the record, her inlaws live in my Congressional District. So I have a particular interest in the success of Ms. Wilson as a member of the subcommittee. Welcome.

Chairman BLILEY. And I hope they are well represented.

Mr. OXLEY. You don't have to comment on that, Mrs. Wilson. The gentlelady from New Mexico.

Mrs. WILSON. Mr. Chairman, thank you very much. The subject that we're having a hearing on today is very important to me having previously been in small business helping American companies to succeed abroad, and I'm very pleased that we're addressing this problem that I think will benefit American business.

I would also say that my husband's grandmother, who is ailing and 95, is also in your district and she is lobbying all the members of her nursing home to write me in for the election. So if you have some inexplicable votes out there, that's what's going on in the nursing home. Thank you.

Mr. OXLEY. I thank you.

Does the gentleman from Georgia have an opening statement?

Mr. DEAL. No, Mr. Chairman.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Thank you, Mr. Chairman. Let me begin by commending you for calling this morning's hearing. I am pleased to be a cosponsor of H.R. 4353, which implements the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In 1977, Congress enacted the Foreign Corrupt Practices Act ("FPCA") as a response to widely reported scandals and investigations by the Securities and Exchange Commission which uncovered large numbers of payments to foreign officials and illegal domestic political contributions by American corporations. Hundreds of U.S. corporations were found to have made illicit payments to foreign government officials, including more than 25 percent of the Nation's top Fortune 500 companies. Such practices were fundamentally inconsistent with the principles of free and fair markets, harmful to the foreign policy interests of the United States, and, ultimately, damaging to the interests of the shareholders of these U.S. companies.

In response, the FCPA established an explicit bar against bribing foreign government officials. At the same time, because many of these payments were hidden in illegal corporate slush funds, Congress amended the federal securities laws to require issuers of securities to keep accurate books and records and to devise and maintain a system of internal accounting controls. When Congress enacted this legislation, it was hoped that by taking the lead to curb bribery by our corporations, America would put pressure on the other developed industrialized nations to adopt similar laws. In 1988, frustrated by the failure of other countries to follow our lead, the Congress enacted legislation—as part of the Omnibus Trade Bill—which charged the President to negotiate an agreement with the other developed industrialized nations that would require them to enact legislation similar to the FCPA. At the same time, the Subcommittee enacted certain amendments to the law to provide U.S. corporations with additional guidance as to how they should conduct their affairs abroad in conformance with the FCPA.

Today, this Subcommittee will be reviewing the legislation which is the fruit of our earlier legislative effort to put pressure on foreign nations to adopt strong laws against bribing foreign government officials. After many years of difficult negotiations, the U.S. has finally succeeded in securing the agreement of 33 countries, including almost all of the OECD states and several other nations, to a Convention which is closely modeled after the FCPA. In order to implement the terms of the Convention, H.R. 4353 makes a number of changes in U.S. law. These changes actually strengthen the statute by extending its coverage to cover foreign persons and corporations, bribes paid to officials of international organizations, and clarifying that the law's prohibitions should be construed to cover any payments made to secure "any improper advantage."

I strongly support this legislation and hope, Mr. Chairman, that we will promptly proceed to mark up this bill and send it to the House floor as soon as possible, so that it might clear the President's desk by the end of this Congressional session. I look forward to hearing the testimony of the Commerce Department and the SEC on this bill this morning, and I yield back the balance of my time.

Mr. OXLEY. We now turn to our panel. Our first witness is Mr. Andrew Pincus, General Counsel, Office of General Counsel with the U.S. Department of Commerce.

Mr. Pincus, welcome.

STATEMENT OF ANDREW PINCUS, GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. PINCUS. Thank you very much, Mr. Chairman.

Thank you very much for the opportunity to testify before you today on this very important legislation. Let me first convey Secretary Daley's apologies that the was unable to appear today. As you know, Mr. Chairman, he feels very, very strongly about this issue and I will try to do justice to his views in representing him here today.

I want to thank you and Chairman Bliley for your leadership in introducing the bill and in moving this process forward because, as you said and we agree, as it has all along with this issue, the United States has to take the lead in bringing the world really up to our standard in combating bribery.

Implementation of this treaty around the world is absolutely vital to the promotion of our democratic ideals. Corruption is completely inconsistent with free and fair government, and implementation of this treaty is also vital to the ability of American companies to compete in the global economy. The unfortunate reality is that last year we estimate $30 billion in international contracts were alleged to involve bribery by foreign firms.

Twenty-one years ago the United States was the first country to make it a crime for our citizens and companies to bribe officials of another land. Ten years ago Congress called upon the executive branch to negotiate with our trading partners to see if they, too, would join with us in making that activity a crime.

Stamping out bribery of foreign public officials is a high priority of the administration, and getting the OECD to agree to this treaty was one of Secretary Daley's top priorities when he first took office about 18 months ago. He personally worked with his counterparts in Europe and other countries to convince them that this was something that the OECD had to do, and worked to bring about the agreement that resulted in the signing of this treaty by us and 32 other nations last December.

But the government is not alone in this fight. The business community, which for so long has labored under a competitive disadvantage, strongly supports these efforts and, as your comments have demonstrated, there is bipartisan support here in Congress for this effort. We thank you very much for that. This united front has made it much easier for us to push this position around the world.

I can report today that a number of our trading partners, such as Germany, have been moving forward in the implementation process to both ratify the Convention and to implement the agreement in their domestic laws. We, too, are making progress. As you know, on July 31 the Senate unanimously approved the Convention and the implementing legislation.

Mr. Chairman, it's our strong hope that the House will act quickly. Even though we know the time in the legislative session is short

and there is other pressing business, we hope that a bill can be enacted this year. The plain fact is, as you said, Mr. Chairman, the United States has to take the lead. Other countries are really sitting back and waiting to see what we will do.

There wasn't great eagerness around the world to move this forward. It's really as a result of the pressure that we've brought to bear, and that the business community both here and in other countries has brought to bear, that other governments were convinced that they had to move ahead. But they are not eager to move quickly, we don't believe, in the ratification process. We believe they're waiting for us to take the lead, and once we move forward and complete that process other countries will fall into line. The sooner we act the sooner they will act.

Let me explain briefly some of the key provisions of the implementing legislation. As you know, the Convention was modeled after our Foreign Corrupt Practices Act, so there aren't many changes that are needed to bring the FCPA into line with what the Convention requires. Let me just list them quickly:

First, our current law criminalizes payments made to influence any decision of foreign officials or induce them to obtain business. Under the OECD Convention we have to make it explicit that payments made to secure "any improper advantage" are also prohibited.

Second, the Convention calls on parties to prohibit the bribery of foreign public officials by "any person." So we have to expand our law to cover all foreign persons who commit acts in furtherance of a foreign bribe while they're in the United States, because currently our law only applies to domestic persons.

Third, the Convention includes officials of public international organizations within the definition of public officials. We have to expand our definition to cover those officials as well.

Fourth, the Convention calls on signatories to assert nationality jurisdiction over offenses committed abroad by their citizens. So we need legislative changes that will give that jurisdiction under our law over the acts of American business that take place outside the United States.

Fifth and finally, the legislation would subject all employees or agents of U.S. business, regardless of nationality, to both civil and criminal penalties. Currently under our law, non-U.S. nationals are subject to only civil penalties.

One of the greatest impacts of the FCPA has been the business community's response. Most companies have instituted internal controls and auditing practices to make sure that their officials know that this kind of conduct is illegal. And one of the very salutary effects of this treaty, as this process is adopted in laws around the world, we believe, will be that other companies will adopt the practices that U.S. companies have followed for years.

The Convention also provides a monitoring system through an OECD Working Group on Bribery. There will be regular peer reviews both with respect to the implementation process, to be sure the countries enact legislation that complies with the Convention's terms, and then to follow up on effective enforcement. So we think that is a key way that we're going to able to determine whether other countries actually do what they've promised to do.

Let me make one final point. This treaty is important, but it's only one part of our comprehensive strategy to fight corruption. In our own hemisphere we recently concluded the InterAmerican Agreement Against Corruption. We are working with the IMF and other multilateral development banks to encourage countries to promote good government and the rule of law. We also work with countries, emerging democracies especially, to promote transparent procurement practices and train them in how to have ethical monitoring agencies within their own government.

We also plan to push this issue with our Asian partners. Secretary Daley is working to get this issue on the agenda of the Asian Pacific Economic Cooperation Forum when it meets later this year in Malaysia.

Finally, within the OECD there are additional aspects of the bribery issue that will be discussed. For example, how do we address the bribery of foreign political parties, party officials and candidates for office? Our law covers bribes paid to all of these, but the Convention covers only some. At our urging OECD members have agreed to discuss this issue at the May 1999 Ministerial Meeting.

We must have transparency in business dealings if the global economy is to grow and prosper. If we do not, we will not have learned one of the important lessons coming out of the Asian economic crisis. Every commentator on that crisis has pointed out that one of the problems that led to the collapse of those economies was the lack of transparency within them. No economy can survive under a cover of darkness.

Thank you very much, and I'll be pleased to answer any of the subcommittee's questions.

[The prepared statement of Andrew J. Pincus follows:]

PREPARED STATEMENT OF ANDREW J. PINCUS, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. Chairman and Members of the Committee: Twenty one years ago, the United States Congress passed the Foreign Corrupt Practices Act, becoming the first country to make it a crime for its citizens and companies to bribe the officials of another country. This was a courageous and farsighted action for our country to take, and one that reaffirmed our leadership in the regulation of international business practices.

Ten years ago, the Congress amended the Foreign Corrupt Practices Act (FCPA), and, more importantly, called upon the Executive Branch to negotiate—with our trading partners at the Organization for Economic Cooperation and Development—an international agreement that would require our trading partners to enact laws similar to our FCPA.

I can attest to the high priority that this Administration has placed on getting the world's largest industrialized economies to adopt strict anti-bribery laws. Our goal has been to bring other countries up to our high standard, and to ensure that our firms would no longer labor under a competitive disadvantage in international trade.

At the Commerce Department, we have focused on the issue of bribery in international business transactions for years. It has also been a major focus of our National Export Strategy. This Convention represents a major component of our strategy to eliminate bribery from international trade.

Now, with the strong support of the business community and members of Congress, both Republicans and Democrats, we have achieved our goal. On December 17 of last year, the United States signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Thirty-three nations have now agreed to enact criminal laws that will follow closely the prohibitions found in our FCPA. Now, the world's largest economies must outlaw the bribery of foreign public officials in international business transactions. This

is a major achievement that will provide for a more level playing field for U.S. businesses overseas.

Mr. Chairman, the prevalence of bribery in international transactions has been costly for the United States, for the countries whose officials demand or accept bribes, and also for the countries whose companies pay bribes. Bribery hurts U.S. exporters and suppliers in every state and district in our country. In economies in transition, it hinders economic growth and the development of democracy.

The governments that have signed the Convention have agreed to seek to ratify it and to enact implementing legislation, by the end of this year. But, and I cannot stress this point enough, action on the part of the United States is important. Our leadership has led to the negotiation and signing of the Convention—now our leadership will bring the Convention into effect by spurring our major competitors to ratify and implement it. Our work is cut out for us: we must ensure timely and complete U.S. implementation of the Convention, so that our businesses may reap the benefits of this Convention as soon as possible. Overall, I think that working together we have made tremendous progress, and I look forward to bringing this Convention into effect at the earliest possible date.

Let me briefly go over what this Convention does.

First, the Convention obligates the parties to criminalize the bribery of foreign public officials. This obligation includes bribery of officials in all branches of government, whether appointed or elected, and includes officials of public agencies, public enterprises, and public international organizations.

The parties must apply "effective, proportionate, and dissuasive criminal penalties" to the bribery of foreign public officials. The bottom line for those who bribe will be fines, loss of business, and, in some cases, imprisonment. If a party's legal system does not include the concept of corporate criminal liability, the party must provide for equivalent non-criminal sanctions, including monetary penalties.

The Convention requires that parties be able to seize or confiscate both the bribe and the proceeds of the bribe—the net profits that result from the transaction—or to impose equivalent fines, so as to provide a powerful disincentive to bribery. Under our law, the ability to impose substantial fines has had a significant impact on corporate compliance.

The Convention has strong provisions on mutual legal assistance and extradition. The mutual legal assistance provisions will greatly enhance cooperation with foreign governments in cases of alleged bribery, improving both the enforcement of our FCPA and enforcement by foreign governments of their new antibribery statutes.

Mr. Chairman, while this Convention will go a long way towards leveling the playing field for our businesses, there are some aspects of the bribery problem that we are still discussing with our trading partners. These are the bribery of foreign political parties, party officials, and candidates for political office. Our law covers bribes paid to all of these, but the Convention covers only business-related bribes made *through* political parties, party officials, and candidates to persons otherwise covered. It also covers bribes that foreign public officials *direct to* parties, party officials, and candidates. At our urging, OECD members have agreed to discuss these issues on a priority basis in the OECD's antibribery working group. We will take up these issues again at the May 1999 OECD annual ministerial meeting. I am confident that the parties to the Convention will find effective solutions to these remaining issues.

I am proud to say that we have already made significant progress towards bringing the Convention into effect. On July 31, the Senate unanimously passed a resolution of advice and consent to ratification of the Convention. On the same day, the Senate voted approval of implementing legislation that would make the necessary changes to the FCPA to make it fully consistent with the Convention. Mr. Chairman, it is my strong hope that the House will also act quickly on the implementing legislation so that the United States can deposit its instrument of ratification with the OECD.

What to expect from other Parties to the Convention

The greatest impact of our Foreign Corrupt Practices Act over the years has been the business community's own response to the law: they have adopted meaningful internal corporate controls, effective internal and external auditing, and the adoption of codes of conduct. We would expect to see a similar response, when this Convention is implemented, by the business communities of the other Parties to the Convention.

The Convention also provides us, for the first time, with a mechanism to monitor, through regular peer review within the OECD, both the quality of the n enacted by other nations, and the effectiveness of their enforcement of th tion. Regular comprehensive monitoring will provide us with the ability

mine whether other nations actually do what they have agreed to do. I expect that soon after the Convention enters into force, we will begin to see a sharp curtailment in the practice of bribery of foreign public officials in major international business transactions. For the first time, our competitors will have to weigh the risks of bribery against the supposed benefits.

Related initiatives

This Convention is not our only anti-corruption effort. It is the centerpiece of a comprehensive U.S. government strategy to combat bribery and corruption abroad. In our own hemisphere, we successfully concluded the Inter-American Agreement Against Corruption, which has recently been submitted to the Senate for its advice and consent. Three Latin American countries were among the five non-OECD members that have signed the OECD anti-bribery Convention. We are also working with the International Monetary Fund and multilateral development banks, to encourage those institutions to help countries promote good governments and the rule of law.

In the OECD as well, we are pressing our partners that still allow tax deductibility of bribes to eliminate this unacceptable treatment. Progress is already being made in countries such as Denmark, Norway, and Portugal. This progress on eliminating tax deductibility will be accelerated when the Convention comes into force.

In addition, in May the President unveiled the first ever international crime control strategy. In that strategy it was announced that Vice President Gore will host an international conference on reducing corruption among public officials, including security and justice officials.

We and all signatories to the Convention agreed to seek approval and enactment of implementing legislation by the end of 1998. We believe that it is essential that the United States meet this schedule. Mr. Chairman, the business community in the United States has expressed to me its strong support for our efforts to bring this Convention into effect as soon as possible. If we do not, other countries will use our delay as an excuse to avoid or delay their own implementation. The sooner we act in ratifying the Convention, and enacting our implementing legislation, the sooner others will act. And that will therefore level the playing field on which our companies must compete to obtain business overseas.

Implementing legislation

Mr. Chairman, I would like to explain briefly the provisions of the implementing legislation that is before your Committee, the "International Anti-Bribery and Fair Competition Act of 1998," otherwise known as H.R. 4353.

Since the Convention is very similar to our FCPA, the bill incorporates amendments necessary to bring our law into full compliance with its obligations and to implement the Convention. The proposed amendments are tailored so that our law will have a scope similar to what we expect our major trading partners to achieve as they enact their laws. I would like to emphasize that we have been working very closely with the business community on these issues and therefore have been careful not to put U.S. firms at a competitive disadvantage.

The bill would amend the FCPA to conform to the requirements of and to implement the OECD Convention. First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce him to do or omit to do any act in order to obtain or retain business. The bill would make explicit that payments made to secure "any improper advantage," the language used in the OECD Convention, are prohibited by the FCPA.

Second, the OECD Convention calls on parties to cover "any person." The current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The bill would, therefore, expand coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.

Third, the OECD Convention includes officials of public international organizations within the definition of "public official." Accordingly, the bill similarly expands the FCPA definition of public officials to include officials of such organizations.

Fourth, the OECD Convention calls on parties to assert nationality jurisdiction over offenses committed abroad when consistent with national legal and constitutional principles. Accordingly, the bill would provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.

Fifth and finally, the bill would amend the penalties applicable to employees and agents of U.S. businesses to eliminate the current disparity between U.S. nationals and non-U.S. nationals employed by or acting as agents of U.S. companies. In the current statute, such non-U.S. nationals are subject only to civil penalties. The bill

would eliminate this restriction and subject all employees or agents of U.S. businesses to both civil and criminal penalties.

With respect to potential impacts on the criminal justice system, the bill imposes new criminal penalties on two classes of persons: (a) foreign nationals employed by or acting as agents of U.S. companies, and (b) foreign nationals and foreign companies that engage in unlawful acts in the United States. In addition, the liability of U.S. persons is expanded to the extent that unlawful acts taken wholly outside the United States will now result in the same penalties as those taken within the United States under the existing statute.

H.R. 4353 also includes several provisions relating to the status of certain international telecommunications organizations under the FCPA and to the privileges and immunities afforded to such organizations. We would be concerned about provisions that would cause controversy that could delay passage of this critical legislation implementing the Anti-Bribery Convention. However, we have had several conversations with the Committee staff regarding these provisions and, with certain technical changes that we have discussed, we would accept these telecommunications provisions.

Conclusion

In conclusion, the successful culmination and conclusion of this OECD Anti-Bribery Convention has been a genuine bipartisan effort, spurred by the Congress over the past 10 years, and one that several administrations have given priority to. I welcome the Committee's interest in this important issue, and I urge you to take action to approve implementing legislation for the OECD Convention, and to ensure that the benefits of the Convention are realized rapidly, so that our own companies can at last conduct their business on a more level playing field. Thank you again, and I am pleased to answer any and all questions.

Mr. OXLEY. Thank you, Mr. Pincus.

The Chair would note we've got about 10 minutes or so before the vote on the floor. Let me inquire, Mr. Gerlach, how long do you estimate your testimony would be?

Mr. GERLACH. About the same length as Mr. Pincus's.

Mr. OXLEY. All right. Why don't we proceed with you and then we'll take a break and come back for questions if that's okay.

Let me introduce you to Paul V. Gerlach, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission.

Mr. Gerlach, welcome.

STATEMENT OF PAUL V. GERLACH, ASSOCIATE DIRECTOR, DIVISION OF ENFORCEMENT, SECURITIES AND EXCHANGE COMMISSION

Mr. GERLACH. Thank you, Chairman Oxley, Congressman Manton and other members of the committee.

I appreciate the opportunity to testify on behalf of the U.S. Securities and Exchange Commission concerning this legislation to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Commission would like to congratulate the committee on holding hearings and considering legislation on this important issue.

The Commission strongly supports the securities law provisions of H.R. 4353 which it believes are necessary to implement the OECD Convention. Through the OECD Convention 33 nations have now committed to eradicate bribery of foreign officials by companies transacting business in the international marketplace. This Convention, which is largely consistent with existing U.S. law, the Foreign Corrupt Practices Act, is designed to level the playing field upon which U.S. companies compete in the international business arena and to create transparent business practices around the world. To continue momentum for the OECD Convention it's impor-

tant that the U.S. enact implementing legislation on schedule to ensure FCPA consistency with the Convention.

The U.S. has been a world leader in combating corruption in the global marketplace for over 20 years. The SEC has been and will continue to be at the forefront of that effort. Among the tools that the SEC relies upon is the FCPA. Enacted in 1977, the FCPA makes illegal the payment of bribes to foreign officials for the purpose of obtaining or retaining business. The FCPA also created books and records and internal control provisions of the Federal securities laws that are widely used by the Commission to combat fraud by public companies both at home and abroad.

The problem of bribery by U.S. corporations doing business abroad first surfaced during the 1970's when the press reported allegations of questionable payments by U.S. companies to foreign government officials. Enforcement action by the SEC and the Department of Justice in the mid-'70's confirmed that illicit payments were a significant problem.

As a result of the potential magnitude of that problem, the SEC began a voluntary disclosure program under which the Commission offered not to bring enforcement actions against companies that disclosed past payments and agreed to implement internal procedures to prevent bribery in the future. Under that program over 400 U.S. companies, including 117 of the top Fortune 500 companies, admitted making questionable or illegal payments in excess of $300 million to foreign government officials. The Commission submitted a report to Congress together with a legislative proposal.

In response to those events, Congress enacted the FCPA in 1977 amending the Securities Exchange Act of 1934. This made the U.S. the first government to outlaw the bribery of foreign officials. The FCPA attempts to stop corporate bribery through three basic means:

First, by making it illegal to bribe foreign officials to obtain or retain business.

Second, by requiring companies subject to SEC reporting requirements to keep detailed books and records that accurately reflect corporate payments and transactions.

Third, by requiring companies subject to SEC reporting requirements to institute and maintain an internal accounting system to assure management's control over the company's assets. The Commission has been vigorous in its enforcement of the FCPA bringing a number of cases involving the anti-bribery provisions and hundreds of cases enforcing the books and records and internal control provisions of the FCPA.

Critics of the FCPA have long argued that it placed American business at a competitive disadvantage in the foreign marketplace because other countries did not have similar prohibitions against bribery. It was argued that this disadvantage meant lost opportunities for American companies in the global marketplace, possibly affecting overseas procurements valued in the billions of dollars each year. Indeed, as Chairman Bliley mentioned, some of our trading partners explicitly encourage such bribes by permitting businesses to claim them as tax deductible business expenses.

In 1988, in conjunction with amendments to the FCPA, Congress sought to address this competitiveness issue. It charged the Presi-

dent to negotiate an agreement with other OECD members requiring them to enact legislation similar to the FCPA to combat the problems created by bribery and required the President to report to Congress within 1 year of passage on the progress of these negotiations. Since 1988 the United States has been urging other countries to criminalize bribery of foreign officials by their nationals. The legislation at issue today is the culmination of these efforts.

Since Congress' 1988 directive to the President to engage in efforts to combat bribery, efforts to combat corruption have gained increasing support in the international community. These efforts culminated in the OECD Convention, a treaty negotiated by the OECD and signed by the U.S. and 32 other nations on December 17, 1997 in Paris. The Commission has been an active participant in this project and is pleased with the OECD Convention.

The Convention calls on all parties to make it a criminal offense for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

It calls on all parties to assert territorial jurisdiction broadly and, where consistent with national legal and constitutional principles, to assert nationality jurisdiction. All 33 nations have pledged to seek approval of the Convention and enactment of implementing legislation by the end of 1998. In addition, if ratified, the OECD Convention would facilitate cooperation among participating countries in investigating instances of alleged bribery.

Although the OECD Convention is largely consistent with existing U.S. law, the FCPA, as well as Section 30A of the Exchange Act, would need to be amended slightly to implement the Convention. The bill before you is designed to make the necessary implementing changes to existing U.S. law. The conforming changes to the Exchange Act proposed by H.R. 4353, which are largely minor in nature, are as follows:

First, the OECD Convention——

Mr. OXLEY. Mr. Gerlach, we have a vote on the floor in about 5 minutes, and Mr. Manton takes longer than most to get over there to vote.

Mr. MANTON. Age discrimination.

Mr. OXLEY. So let me interrupt you now, and we'll complete your testimony when the subcommittee returns.

The subcommittee is in recess for 10 minutes.

[Brief recess.]

Mr. OXLEY. The subcommittee will reconvene and, Mr. Gerlach, you may resume.

Mr. GERLACH. Thank you, Chairman Oxley.

I was just starting to talk about the conforming changes to the Exchange Act proposed by H.R. 4353 which are largely minor in nature.

First, the OECD Convention bans payments made to secure ıy improper advantage. The FCPA currently prohibits payments ı in order to obtain or retain business. Thus, H.R. 4353 clari

scope of FCPA liability to explicitly include the OECD Convention language of securing "any improper advantage" from a foreign official.

Second, the OECD Convention includes officials of international agencies within the definition of foreign official. Thus, H.R. 4353 expands the definition of covered public official to include officials of public international organizations.

Third, the OECD Convention provides for nationality jurisdiction. H.R. 4353 conforms to the Convention by providing an additional basis for jurisdiction over foreign bribery by U.S. issuers and U.S. persons that are officers, directors, employees, agents or stockholders of such issuers. Accordingly, the bill will amend the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place outside the United States irrespective of whether in doing so they make any use of the mails or means or instrumentalities of U.S. interstate commerce.

Fourth, the OECD Convention necessitates conforming penalties for non-U.S. citizen employees and agents of issuers and domestic concerns to penalties for U.S. citizen employees and agents.

In conclusion, the Commission has aggressively enforced the FCPA and strongly supports the OECD Convention and the implementing legislation as a means to provide a more level playing field for U.S. companies abroad.

I would be pleased to answer any questions the committee might have.

[The prepared statement of Paul V. Gerlach follows:]

PREPARED STATEMENT OF PAUL V. GERLACH, ASSOCIATE DIRECTOR, DIVISION OF ENFORCEMENT, U.S. SECURITIES AND EXCHANGE COMMISSION

Chairman Oxley, Congressman Manton and other Members of the Committee: I appreciate the opportunity to testify on behalf of the U.S. Securities and Exchange Commission ("SEC" or "Commission") concerning H.R. 4353, legislation to implement the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The Commission would like to congratulate the Committee on holding hearings and considering legislation on this important issue. The United States, as a signatory to the OECD Convention, has agreed to seek approval and enactment of implementing legislation by the end of 1998.

The Commission strongly supports the securities laws provisions of H.R. 4353, which it believes are necessary to implement the OECD Convention. Through the OECD Convention, 33 nations have now committed to eradicate bribery of foreign officials in order for companies to transact business in the international marketplace. This Convention, which is largely consistent with existing U.S. law, the Foreign Corrupt Practices Act ("FCPA"), is designed to level the playing field upon which U.S. companies compete in the international business arena and to create transparent business practices around the world. To continue momentum for the OECD Convention, it is important that the United States enact implementing legislation on schedule to ensure FCPA consistency with the Convention.

BACKGROUND OF THE FOREIGN CORRUPT PRACTICES ACT

The United States has been a world leader in combating corruption in the global marketplace for some time. The Commission has been—and will continue to be—at the forefront of that effort. Among the statutory tools that the SEC relies upon is the FCPA.[1] Enacted 20 years ago, the FCPA makes illegal the payment of bribes

[1] Pub. L. No. 95-213, 91 Stat. 1494 (1977), as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, §§5001-03, 102 Stat. 1415 (1988) (codified as amended at 15 U.S.C. §§78m, 78dd-1, 78dd-2, 78ff).

to foreign officials for the purpose of obtaining or retaining business. The FCPA also created books and records and internal controls provisions of the federal securities laws that have been more generally used by the Commission to combat fraud.

The problem of bribery by United States corporations doing business abroad first surfaced during the 1970s when the press reported allegations of questionable payments by United States companies to foreign government officials. In 1973, several corporations and executives were charged with using corporate funds for illegal domestic political contributions by the Office of the Special Prosecutor of the Department of Justice. Since the nondisclosure of these activities might entail violations of the federal securities laws, the Commission published a statement of the view of the Division of Corporation Finance concerning disclosure of these matters in public filings. This release explains that indictments, guilty pleas, and convictions of corporations or their officers or directors for illegal acts are "material to an evaluation of the integrity of the management of the corporation as it relates to the operation of the corporation and use of corporate funds."[2]

Commission staff also discovered falsification of corporate financial records to conceal the use of corporate funds as well as the existence of secret "slush funds" disbursed outside the normal financial system. The resulting investigations culminated in settled injunctive actions against 14 companies as of May 10, 1976.

As a result of the potential magnitude of the problem, the Commission began a voluntary disclosure program under which the Commission offered not to bring enforcement actions against companies that disclosed past payments and agreed to implement internal procedures to prevent bribery in the future. Under the program, over 400 United States companies, including 117 of the top Fortune 500 companies, admitted making questionable or illegal payments in excess of $300 million to foreign government officials.[3] The Commission submitted a report to Congress together with a legislative proposal.[4]

ENACTMENT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977

In response to these events, Congress enacted the Foreign Corrupt Practices Act of 1977, amending the Securities Exchange Act of 1934 (the "Exchange Act"), and making the United States the first government to outlaw bribery of foreign officials. The FCPA attempts to stop corporate bribery through three basic means:

- First, by making it illegal to bribe foreign officials to obtain or retain business. The Commission has civil enforcement authority over the violation of the anti-bribery provisions by domestic or foreign public companies whose securities are registered with the SEC, and the Department of Justice has both civil and criminal enforcement authority for violations of the anti-bribery provisions by domestic concerns, as well as for criminal actions involving issuers. The FCPA covers payments to foreign government officials, political parties, party officials, political candidates, and intermediaries (the anti-bribery provision). Section 30A(a) of the Exchange Act (15 U.S.C. § 78dd-1(a));
- Second, by requiring companies subject to SEC reporting requirements to keep detailed books and records that accurately reflect corporate payments and transactions (the books and records provision). Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)); and
- Third, by requiring companies subject to SEC reporting requirements to institute and maintain an internal accounting system to assure management's control over the company's assets (the internal controls provision). Section 13(b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B)).[5]

SUBSEQUENT EVENTS

Critics have contended that the FCPA places American businesses at a competitive disadvantage in the foreign marketplace because other countries do not have similar prohibitions against foreign bribery. This disadvantage may mean lost opportunities for American companies in the global marketplace, possibly affecting overseas procurements valued in the billions of dollars each year. Indeed, some of

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[2] Securities Act Release No. 5466 (Mar. 8, 1974).

[3] H.R. Rep. No. 95-640 at 4 (1977).

[4] Securities and Exchange Commission, 94th Cong., Report on Questionable and Ill Corporate Payments and Practices (Comm. Print 1976).

[5] In addition, as a result of amendments to the FCPA in 1988, it is unlawful for any p to knowingly circumvent or knowingly fail to implement a system of internal trols, or to knowingly falsify any book, record, or account described in Section 1 tion 13(b)(5) of the Exchange Act (15 U.S.C. § 78m(b)(5)).

our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses.

In 1988, in conjunction with amendments to the FCPA, Congress sought to address the competitiveness issue. It charged the President to negotiate an agreement with the other OECD members requiring them to enact legislation similar to the FCPA to combat the problems created by bribery, and required the President to report to Congress within one year of passage on the progress of these negotiations. Since 1988, the United States has been urging other countries to criminalize bribery of foreign officials by their nationals.

The legislation at issue today is the culmination of these efforts.

THE COMMISSION'S ENFORCEMENT OF THE FCPA

The Commission has brought four enforcement cases involving the anti-bribery provision of the FCPA.[6] The Commission has also brought numerous cases enforcing the books and records and internal controls provisions of the FCPA.[7]

One recent case involving bribery as well as the books and records and internal controls provisions of the FCPA is *SEC v. Triton Energy Corp.* In this case, the SEC alleged that during the years 1989 and 1990, two former senior officers of Triton Indonesia, a subsidiary of Triton Energy, authorized numerous improper payments to the subsidiary's business agent who acted as an intermediary between Triton Indonesia and Indonesian government agencies, knowing or recklessly disregarding the high probability that the business agent either had or would pass such payments along to Indonesian government employees for the purpose of influencing their decisions affecting the business of Triton Indonesia. The two former senior officers, along with other Triton Indonesia employees, concealed these payments by falsely documenting and recording the transactions as routine business expenditures. Triton Indonesia also recorded other false entries in its books and records. Although Triton Energy did not authorize or direct these improper payments and misbookings, when Triton Energy's internal auditor notified its management of the violations in a memorandum, Triton Energy's former president ordered that all copies of the memorandum be destroyed, and Triton Energy's management failed to put a stop to the illicit activities.

Without admitting or denying the allegations, Triton Energy consented to the entry of an injunction that permanently enjoins it from future violations of the books and records and internal controls provisions of the FCPA, and ordered it to pay a $300,000 penalty. The two former senior officers each consented to the entry of an injunction that permanently enjoins them from future violations. One was ordered to pay a $35,000 penalty and the other to pay a $50,000 penalty. The result in *Triton* makes clear that whenever senior management becomes aware of FCPA violations, even if it did not authorize them in the first instance, it is liable for failure to investigate and put an end to such violations.

OECD CONVENTION

Since Congress' 1988 directive to the President to engage in international efforts to combat bribery, efforts to combat corruption have gained increasing support in the international community. These efforts finally culminated in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business

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[6] *See SEC v. Triton Energy Corp.*, Litigation Release No. 15266 (Feb. 27, 1997) and Litigation Release No. 15396 (June 26, 1997); *SEC v. Ashland Oil, Inc.*, Litigation Release No. 11150 (July 8, 1986); *SEC v. Sam P. Wallace Co.*, Litigation Release No. 9414 (Aug. 13, 1981); and *SEC v. Katy Industries, Inc.*, Litigation Release No. 8519 (Aug. 30, 1978).

[7] The Commission has brought more than 300 cases involving the books and records and internal controls provisions of the FCPA. *See e.g., SEC v. William Trainor, Vincent D. Celentano, Medical Diagnostic Products, Inc. (f/k/a/ Novatek International, Inc.), et al.*, Litigation Release No. 15786 (June 18, 1998) and Litigation Release No. 15844 (Aug. 12, 1998); *SEC v. Charles T. Young and Selig Adler*, Litigation Release No. 15794 (June 29, 1998); *SEC v. Joseph C. Allegra, David Hersh, J. Lee Ledbetter and H. Flynn Clyburn*, Litigation Release No. 15384 (June 11, 1997); *SEC v. Policy Management Systems Corp., et al.*, Litigation Release No. 15417 (July 23, 1997); *SEC v. Structural Dynamics Research Corp., et al.*, Litigation Release No. 15325 (Apr. 10, 1997); and *SEC v. Kendall Square Research Corp., et al.*, Litigation Release No. 14895 (Apr. 29, 1996) and Litigation Release No. 15155 (Nov. 12, 1996). Notably, these provisions extend to all issuers who register securities with the Commission, even foreign issuers. *See e.g., SEC v. Montedison, S.p.A.*, Litigation Release No. 15164 (Nov. 21, 1996). (The complaint alleged that Montedison, an Italian company, engaged in a scheme designed to conceal hundreds of millions of dollars of payments that, among other things, were used to bribe Italian politicians and other persons. The scheme concealed losses of at least $398 million. The complaint alleged that as a result of the scheme, Montedison's assets were materially overstated on its books and records and in its financial statements for fiscal years 1988 through 1991.)

Transactions (the "OECD Convention"), a treaty negotiated by the OECD and signed by the United States and 32 other nations on December 17, 1997 in Paris.[8] The Commission has been an active participant in this project and is pleased with the OECD Convention.

The OECD Convention calls on all parties to make it a criminal offense "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[9] It further calls on all parties to assert territorial jurisdiction broadly and, where consistent with national legal and constitutional principles, to assert nationality jurisdiction. All 33 nations pledged to seek approval of the Convention and enactment of implementing legislation by the end of 1998. In addition, if ratified, the OECD Convention would facilitate cooperation among participating countries in investigating instances of alleged bribery.

In the U.S., the OECD Convention was forwarded by the President to the Senate in April 1998. The Senate unanimously passed a resolution of advice and consent to ratify the OECD Convention on July 31, 1998.[10]

SPECIFIC PROVISIONS OF H.R. 4353 AS THEY RELATE TO THE EXCHANGE ACT

Although the OECD Convention is largely consistent with existing U.S. law, the FCPA, as well as Section 30A of the Exchange Act, would need to be amended to implement the Convention. H.R. 4353 is designed to make the necessary implementing changes to existing U.S. law. The conforming changes to the Exchange Act proposed by H.R. 4353, which are largely minor in nature, are as follows:[11]

- First, the OECD Convention bans payments made to secure "any improper advantage". The FCPA currently prohibits payments made "in order to obtain or retain business". H.R. 4353 clarifies the scope of FCPA liability to explicitly include the OECD Convention language "securing any improper advantage" from a foreign official. H.R. 4353 effects this change in Section 2(a) by amending Section 30A(a) of the Exchange Act (15 U.S.C. §78dd-1(a));
- Second, the OECD Convention includes officials of international agencies within the definition of "foreign public official." H.R. 4353 expands the definition of covered "foreign official" to include officials of public international organizations. Section 2(b) of H.R. 4353 amends Paragraph 1 of Section 30A(f) of the Exchange Act (15 U.S.C. §78dd-1(f));
- Third, the OECD Convention provides for nationality jurisdiction. H.R. 4353 conforms to the OECD Convention by providing an additional basis for jurisdiction over foreign bribery by U.S. issuers and U.S. persons that are officers, directors, employees, or agents, or stockholders of such issuers. Accordingly, the bill will amend the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place outside the United States, irrespective of whether in doing so they make any use of the mails or means or instrumentalities of U.S. interstate commerce. The Commission has been advised by the Department of Justice that this exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles. It is within the constitutional grant of power to Congress to "regulate Commerce with foreign Nations" and to "define and punish... Offenses against the Law of Nations." U.S. Const. art. I, §8, cl. 3 & 10. Section 2(c) of H.R. 4353 amends Section 30A of the Exchange Act (15 U.S.C. §78dd-1) to effect this change; and
- Fourth, the OECD Convention necessitates conforming penalties for non-U.S. citizen employees and agents of issuers and domestic concerns to penalties for U.S. citizen employees and agents (which are currently more severe). H.R. 4353 amends the penalties applicable to employees and agents of U.S. businesses to eliminate the current disparity between U.S. nationals and non-U.S. nationals

[8] These 33 countries include most of the significant trading countries in the world and consist of 28 OECD Member States and five non-OECD Members who are participants in the OECD's Working Group on Bribery in International Business Transactions. At this time, Australia is the only OECD Member State that has not signed the OECD Convention.

[9] OECD Convention, art. 1, para. 1.

[10] Notably, on the same day, the Senate passed by voice vote S. 2375, its version of implementing legislation for the Convention.

[11] As is its general practice, the Commission is confining its testimony to the amendments affecting the federal securities laws.

employed by or acting as agents of U.S. companies. In the current statute, foreign nationals employed by or acting as agents of U.S. companies (as opposed to officers or directors) are subject only to civil penalties. The bill would eliminate this restriction and, thereby, subject all employees or agents of U.S. businesses to both civil and criminal penalties. Eliminating this preferential treatment implements the OECD Convention's requirement that "[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offence [sic] under its law for *any person* [to make unlawful payments]."[12] Section 2(d) of H.R. 4353 amends Section 32(c) of the Exchange Act (15 U.S.C. § 78ff(c)) to effect this change.[13]

CONCLUSION

The increasing globalization of the world's economy, along with the establishment of capital markets in new environments, have contributed to U.S. companies having increased business dealings and interests abroad. As this trend continues, the risk of U.S. companies operating in situations where bribery of foreign officials is a normal part of doing business increases. Accordingly, it is important to enact, and to encourage other countries to enact, legislation that will provide a more level playing field for U.S. companies in the international marketplace.

The Commission has aggressively enforced the FCPA and strongly supports the OECD Convention and the implementing legislation as a means to provide a more level playing field for U.S. companies abroad.

In sum, the Commission strongly supports the changes to the securities laws contemplated by H.R. 4353.

Mr. OXLEY. Thank you, Mr. Gerlach and Mr. Pincus as well. The Chair will begin a round of questions.

We are reasonably confident that we can get this legislation passed and to the President before Congress adjourns for the year. The next obvious question is then what kind of steps do all of us need to take, particularly the executive branch, to ensure that the other signatories quickly ratify the agreement and that their implementation will conform to the Convention?

Mr. Pincus.

Mr. PINCUS. Well, the Convention itself sets up an OECD process for monitoring what other countries are doing to make sure that, as they go through the implementing steps, what they produce conforms to the Convention's provisions. So we are participating in that effort. In addition the Commerce Department's Trade Compliance Center is itself monitoring what countries are doing to make sure that they are, first of all, taking steps and not doing nothing, but also that they are not going to pass implementing legislation that is not up to snuff. And Secretary Daley and his counterparts I know as they go around the world meeting with their counterparts, always include something on their agenda to raise the issue of whether they are moving forward.

Obviously once we've taken all the steps we have to take it's going to be a lot easier for us to say, okay, we've done it, what about you? But it's very high up on his agenda as he meets with his counterparts around the world to say we all made a commitment to do this by the end of the year. We're moving forward with ours, and we certainly hope you're moving forward with yours.

Mr. OXLEY. There is actually an Office of Compliance within the Commerce Department that tracks those kinds of things?

[12] OECD Convention, art. 1, para. 1 (emphasis supplied).

[13] In addition, Section 4 of H.R. 4353 largely parallels the other provisions of the FCPA to create parity between the treatment of U.S. nationals and foreign nationals. This change is to conform with the OECD Convention's call on parties to cover "any person." The current FCPA covers only issuers covered under the Exchange Act and "domestic concerns."

Mr. PINCUS. Yes, there is. The Trade Compiance Center looks generally at compliance by other countries with agreements and also takes complaints from U.S. companies about ways they may have been mistreated or they feel that companies are not living up to their international obligations. But one of the things Secretary Daley has asked them to do is specifically look at the steps that other countries are taking, and monitor the steps they're taking, to comply with their obligations under this Convention, and we are obviously working closely with the State Department in that effort.

Mr. OXLEY. Now, does the European Union participate in this treaty as the European Union or do the various countries represented also participate? How does that work?

Mr. PINCUS. This is a treaty with the individual countries and not with the EU as an entity. Obviously members of the EU are there, but they are there in their individual capacity. But my understanding is the EU has been quite supportive. They participate as an observer and the Commission has been very supportive of the effort to promote transparency.

Mr. OXLEY. We are going to have a meeting in the next couple of weeks with members of the European Parliament. Do you know offhand what role, if any, the European Parliament will have in these discussions?

Mr. PINCUS. We are not aware that they have any role. I think obviously those are people, though, who in their individual countries have some political prominence and some role. So it seems to be that this is fair game to raise with them as something that we're moving down the pike on and we hope that they're living up to their obligations as well.

Mr. OXLEY. It would be helpful if your staff could advise committee staff as well as my personal staff over the next week as to just about where those folks are in various countries so that when we do meet with their members we will have some kind of an idea what progress they've made.

Mr. PINCUS. We will certainly do that, Mr. Chairman.

Mr. OXLEY. Thank you.

Second, what steps will be taken to ensure that the other signatories will effectively enforce their new anti-bribery and corruption laws in accordance with the Convention? That obviously is an area where many countries have fallen short for numbers of years. What kind of teeth do we have to do that?

Mr. PINCUS. Well the Convention itself actually has an implementation monitoring process, an enforcement monitoring process whereby countries will subject themselves to peer review. Under this process there will be visits from teams made up of other OECD countries to talk about what enforcement efforts have been taken and what the results are of those actions and to really look at whether this is just a law on the books that no one is looking at and to push to make sure that it's something that is actually being done. As you know we don't usually have any concrete teeth in international agreements, but we do have this monitoring and peer review process to sort of make people, through peer pressure if you will, live up to their obligations.

Mr. OXLEY. Mr. Gerlach, what role does the SEC play in the enforcement of the anti-bribery laws and do you have any examples of any recent activities on the part of the SEC?

Mr. GERLACH. The SEC shares—there is basically concurrent jurisdiction between the Justice Department and the SEC. Obviously the SEC is a civil agency. So we have responsibility for the civil enforcement of both the anti-bribery provisions and the internal controls and books and records provisions of the FCPA.

Our most recent significant case in this area is probably the case we brought in February 1997 against a U.S. company, Triton Energy. It had to do with bribes paid by Triton Indonesia which was a wholly owned subsidiary of Triton. The bribes were paid through a business agent in Indonesia to officials of the Indonesian Government in the course of an oil-recovery contract that Triton Indonesia had with the Indonesian Government. That case, was brought as a settled matter in which we obtained an injunction against Triton U.S., the U.S. entity. They paid a $300,000 civil penalty. We brought an injunctive action against the two principal officers of Triton Indonesia who actually were involved in paying the bribes. They consented to injunctions and paid penalties of $50- and $35 thousand respectively.

We also brought a simultaneous administrative cease and desist proceeding against the senior management of the U.S. holding company, Triton Energy. At the time it was a Houston, Texas based company, and the liability of the senior officials of Triton Energy was predicated on the fact that during the course of the illicit payments an internal auditor alerted them to the fact that there were these suspicious payments going on in one of their subsidiaries and rather than diligently following up on this information and examining their practices and procedures, as they should have done under the applicable U.S. securities laws, the president of the company directed that that internal auditor's report be destroyed. Those individuals were sued by the Commission and put under a cease and desist order because the illicit conduct continued after it was brought to the attention of senior management in the U.S. That is probably our most graphic recent example of what we do in this area.

As I said earlier, the internal controls and books and records provisions are used in dozens of cases every year because they apply to activities of domestic corporations as well as corporations that do business overseas.

Mr. OXLEY. Thank you.

Let me ask both of you, I'm told the Convention doesn't fully cover bribes that would go to political parties, for example, or party officials. What is the strategy to encourage nations to make such bribery subject to criminal law?

Mr. Pincus.

Mr. PINCUS. The Convention does cover some aspects of those, as you said, Mr. Chairman. If an official directs the payor by saying, don't pay the bribe to me and instead pay it to my party, then that situation is covered.

Mr. OXLEY. But covered how? Would that mean that both individuals would be culpable, or only the government official as opposed to the party official?

Mr. PINCUS. This is a statute that applies to the payor. It doesn't really deal with recipient liability. We obviously are, as I said in my written testimony, interested in expanding coverage of political parties to the full extent that it exists under the FCPA, and we have gotten an agreement at the OECD that that issue will be on the agenda to be discussed at the Ministerial Meeting next May. And we are obviously going to push very hard to get that issue fully covered and supplemented to the Convention, but we think we've made a very good start here in dealing with that issue.

Mr. OXLEY. What about payments directly to foreign officials that are members of political parties, how does the treaty treat that?

Mr. GERLACH. I don't believe the fact that they were a member of a political party would have any effect at all. If the facts of the investigation disclosed that they were in fact being paid to take an act in their capacity as a foreign government official they would be investigated and potentially treated just as if they were a foreign official and the party affiliation would be irrelevant.

Mr. PINCUS. It wouldn't immunize them. The problem arises if they're only a party official.

Mr. OXLEY. As I understand it, and counsel informs me, the Convention does not cover bribes directly to foreign political entities; is that correct?

Mr. GERLACH. Correct.

Mr. PINCUS. Right, except in the circumstance that I talked about where there has been some directive, and that's the area where we want to look for expansion.

Mr. OXLEY. Mr. Gerlach, did you want to comment?

Mr. GERLACH. I think I just made my comment. Thank you.

Mr. OXLEY. Okay. Thank you. The Chair's time has expired.

The gentleman from New York.

Mr. MANTON. Thank you, Mr. Chairman.

Mr. Pincus, I'm interested in Subsection C of Section V of the bill which requires the President to take all necessary action to eliminate provisions in international agreements that give international satellite organizations immunity from suit or commercial losses. Who is the judge under this provision whether the President has taken all necessary action?

Mr. PINCUS. I think, Congressman Manton, that this directive to the President would be read in light of the Constitution endowing the President with the authority to conduct foreign affairs. So I think, although this is a directive to the President to take steps, it obviously has to be read in that light. So it seems to me the President would still have some leeway given his constitutional authority in this area in terms of those steps.

Mr. MANTON. Now what happens if we or the Congress failed to enact legislation implementing the Anti-Bribery Convention this year and what impact will it have the on the plans of other countries, if you can answer that, to implement the Convention?

Mr. PINCUS. I think our fear is that other countries are holding back waiting for us to take the lead. This is an area where the U.S. has always been pushing the rest of the world, and other countries have obligated themselves to take action by the end of the year. We all obligated ourselves to do that in the Convention, but our concern is that other countries are holding back. In a number of coun-

tries a number of steps have been taken, and then the process has stopped and they're waiting to see whether we go the whole distance or not, and they will be just as happy to wait and not have this go into effect until next year or the year after.

That's why we feel so strongly that we have to take the lead and move quickly, because once we've done that we can go to them and say, you made a commitment to act by the end of the year. We've done that, we've lived up to that commitment, and now it's time for you to live up to your commitment and do the same thing. So we think failure to act will really rob us of the ability to go to other countries and say, please fulfill your obligations, because we won't have fulfilled ours.

Mr. MANTON. Mr. Gerlach, bribing foreign officials to get business contracts has been a crime in the U.S. since 1977, but in some countries it's a tax deductible business expense. As I mentioned in my opening statement, I understand Germany allows tax deductions for payments to government officials to secure business contracts. What other countries, aside from Germany, treat these payments as simply deductible expenses?

Mr. GERLACH. It's my understanding that France falls into that category and that there is one or more Scandinavian countries that are also in that category, and I believe that that is an issue that is being addressed. That has been held up a little bit, but it's being addressed by a working group within the OECD as part of this process and there are ongoing negotiations now to deal with that issue. Some of these countries have taken the position that they would not fix this tax deductibility issue until they had adopted domestic legislation criminalizing that type of conduct.

Mr. MANTON. What has been the history, and I know you talked about one of the more recent cases, the history of prosecutions under the FCPA? Has it been an effective tool in your opinion?

Mr. GERLACH. I think it has been a very effective tool. The SEC has brought a limited number of cases involving the bribery provisions. As I said, we've brought scores of cases involving internal controls and books and records provisions. One of the problems that we have faced is that this conduct by definition typically occurs in a foreign jurisdiction. The prohibited conduct is payments to "foreign government officials." So the relevant witnesses and the relevant documentary information is typically going to be in a foreign jurisdiction. Under our normal subpoena power our power to gather information basically stops at our shores.

One of the critical aspects of the treaty and one of the things that I think will substantially benefit our enforcement program going forward is that there is a mutual legal assistance requirement in the treaty for both civil and criminal law enforcement investigations. The signatory countries will be obligated to cooperate with us in our investigations.

Mr. MANTON. The Act doesn't cover bribes to non-governmental people; is that correct?

Mr. GERLACH. That's correct. Foreign official is a defined term.

Mr. MANTON. And that's a public official. It's not someone who simply doesn't hold an official position but is a decisionmaker within a foreign company that some U.S. company might want to do business with.

Mr. GERLACH. Well there are some interesting legal issues if what you're talking about is a foreign state operated enterprise where the foreign government perhaps has substantial ownership of the company. I can imagine certain scenarios where substantial government involvement in a commercial enterprise could provide us the basis for arguing that an official of that enterprise qualifies as a foreign government official.

Mr. MANTON. Thank you.

Mr. Chairman, I yield back.

Mr. OXLEY. The gentleman's time has expired.

The Chair now recognizes the gentleman from Michigan, the ranking member of the full committee.

Mr. DINGELL. Mr. Chairman, I thank you, and I thank my colleague, Mr. Sawyer for his kindness to me in this matter.

I would ask this question of Mr. Pincus.

Mr. Pincus, how does the provision in Section V relating to the privileges and immunities change the rights and responsibilities of COMSAT and other U.S. companies? It's my understanding that current law does not protect U.S. signatories from antitrust or other offenses when engaged in commercial transactions. Is that correct?

Mr. PINCUS. That current law does not protect them?

Mr. DINGELL. Does not protect them.

Mr. PINCUS. I think, Congressman, I'll have to get back to you on that answer.

Mr. DINGELL. Well that's a very important point and I need a fairly early answer on the question because there is some language in the bill which for some reason or other amends law relative to our international participation in COMSAT and INTELSAT, and I had a curiosity as to why that's there and what its significance is, and I think the committee would like to know whether there is any need for it there or not.

Mr. PINCUS. Well the administration's view with respect to those provisions is that with some technical changes that we've discussed with the staff we are willing to accept those provisions.

Mr. DINGELL. Well let's go to another point. Is there any reason why international satellite policy provisions are required to implement this important Anti-Bribery Convention?

Mr. PINCUS. No. These provisions were not in the proposal that the administration put forward in terms of implementing the legislation.

Mr. DINGELL. Nor are they in the Senate bill. Now would I be fair in inferring if there was some importance to these matters the Senate would have put them in and the administration would have sent them up to us?

Mr. PINCUS. Obviously Chairman Oxley and Chairman Bliley introduced the bill and they decided what was in it. In terms of what the administration view was and in terms of what was required to implement the Convention those provisions were not included.

Mr. DINGELL. Are these provisions extraneous to the purposes of the legislation?

Mr. PINCUS. Well, they're certainly not necessary to meet our obligations under the Convention. Chairman Bliley and Chairman Oxley introduced the legislation and they may have had a broader

purpose. So I don't want to speak for them. But in terms of our view of what is required by the terms of the Convention, those provisions are not required.

Mr. DINGELL. Are there any provisions in the Senate bill like this language?

Mr. PINCUS. No.

Mr. DINGELL. Have you ever inquired as to why the Senate didn't include this language?

Mr. PINCUS. Well this——

Mr. DINGELL. Is there a reason why the administration did not include this language? I mean obviously there must be a reason why this is here, and I just wonder what the view of the administration is on it. You are so surprised that it's here that you're not able to tell me about it, and I'm curious what this means.

Mr. PINCUS. Well I obviously can't speak to why it's there because we didn't introduce the bill.

Mr. DINGELL. With respect for Mr. Pincus, Mr. Chairman, and with gratitude to you and to Mr. Sawyer and my colleagues on the committee I will forego any further embarrassment of this sort and simply ask that Mr. Pincus respond at an early time, a very early time by writing for purposes of inclusion in the record a response to the questions just given, and I ask unanimous consent that it be inserted in the record at the appropriate place.

Mr. OXLEY. Without objection.

Mr. DINGELL. Thank you, Mr. Chairman, and thank you, my colleagues.

Mr. Pincus, I thank you for your courtesy.

Mr. OXLEY. I thank the gentleman from Michigan.

The gentleman from Washington State, Mr. White.

Mr. WHITE. Thank you, Mr. Chairman. Thank you for introducing this bill and holding these hearings. I just have some very general questions to make sure I'm fully educated on this.

To start off and, Mr. Pincus, maybe you're the best one to answer this question, how many countries eventually will be signatories to this Convention? Will there be significant people who will not sign that will be left out, or will this cover the waterfront?

Mr. PINCUS. Well, this covers the waterfront of the membership of the OECD. That obviously is an important group of countries. There are a number of countries that are not members of the OECD. Argentina, for example, is not a member of the OECD but did sign the Convention, and the Convention is open to signature by other countries.

One of the things that Secretary Daley is interested in doing as he goes around the world talking to his counterparts is to talk about the importance of dealing with this issue, and to urge other countries to either join this, or in other areas, such as the Asia Pacific Economic Cooperation Forum, to maybe have their own initiatives and their own agreements or other initiatives to deal with this issue. This treaty, as I mentioned, deals with the payment of bribes. There is another issue, obviously of concern, which is criminalizing the receipt of bribes.

Mr. WHITE. Right, absolutely. But I guess what I'm getting at, and I think you've done a good job of at least setting the framework for the question, is in your opinion who are the two or three key

trading partners we have that won't be signing this Convention at least in the foreseeable future?

Mr. PINCUS. The OECD really encompasses all of our key trading partners, but there are other important countries around the world that we would like to get signed up.

Mr. WHITE. Well let me put it this way. Which are the two or three countries that you're disappointed you haven't signed up yet?

Mr. PINCUS. I'm not sure, Congressman, that there is anyone that we're disappointed about. I mean Asia is an important area of commerce, and obviously less so now maybe than a year ago, but I think in terms of looking down the road, we could look at countries like Indonesia and Malaysia and countries that are going to become economic powerhouses in the future.

Mr. WHITE. China is not on the list I take it.

Mr. PINCUS. China is not on the list.

Mr. WHITE. What about Taiwan, are they on the list?

Mr. PINCUS. No.

Mr. WHITE. How about South America, countries like Brazil and others?

Mr. PINCUS. There are some countries in South America that have signed, as I mentioned. Argentina, Brazil, Chile and Mexico have signed. So those are important countries, but there are still some countries that we would like to urge along the way.

Mr. WHITE. So this isn't going to cover the waterfront by any means and it will be an ongoing process to try to move this forward.

What would you say are the two or three key changes this bill will make in our law? In other words, what changes to our existing law is this treaty going to require us to make?

Mr. PINCUS. I would say the key changes are expanding our law to include officials of public international organizations which, as you know, have assumed prominence, especially in development matters. They are not covered under our current law, but they will be covered under the amendments.

The other key change is, our law now only applies to U.S. domestic persons and entities, and our law would be expanded to include foreign companies and foreign nationals, and that's an important change.

Mr. WHITE. And I take it there are parts of our law that actually didn't make it in the Convention, right, and we'll still be a little stricter than what's required under the Convention in some areas?

Mr. PINCUS. We still will be somewhat stricter, as Chairman Oxley's questions brought out. The question of payments to political parties is an issue that is still on the table and one that we're going to be pushing forward on to try and get increased coverage.

Mr. WHITE. Say we have a country that has the system that the Former Soviet Union used to have where the General Secretary of the party is actually not an elected official of the government but exercises most of the power. I take it that the definition will be broad enough to get to somebody like General Secretary Brezhnev. I guess he sat on the Politburo. So maybe that would help. But I take it it's tight enough so we would get that kind of situation?

Mr. PINCUS. Yes, it does cover that kind of situation—people exercising governmental powers—and also the situation where the

government official says, oh, don't bribe me, bribe my party and I'll do it for you. That situation is also covered, but it's sort of the pure, if you will, bribe to a party that isn't covered and that we want to work toward covering.

Mr. WHITE. Thank you.

Just one last question for Mr. Gerlach. I heard your response as to what sort of litigation you've been able to bring and how effective it has been to sue people. Do you have a sense in terms of just the practices of U.S. companies, recognizing that you can't sue everyone and you probably can't know every time a corrupt practice takes place, but do you have a sense in how effective this program has been at limiting those activities by U.S. companies? I mean is it your sense that there really is very little of this activity going on, or is it still occurring but at less of a pace?

Mr. GERLACH. I think that U.S. companies have been very mindful of their obligations. I think there was certainly a period, and I mentioned in my prepared remarks the voluntary disclosure program that occurred in the late 1970's and the number of enforcement cases brought by the SEC and the Department of Justice. I think that put the American corporate community on notice, and then when Congress enacted the FCPA I think there was a heightened sensitivity to this. I think most major companies that have international business activities have developed comprehensive compliance programs and internal audit functions where they look for these types of problems. I think they're very sensitive to these issues.

I personally have participated in a number of seminars sponsored by the ABA or continuing legal education organizations that have been very well attended by not just members of the Legal Defense Bar, but by in-house counsel from electronics companies, natural resource exploration companies, the types of companies who are involved in activities with foreign governments and in international business transactions and there seems to be a great deal of sensitivity as far as the continuing problem.

I think it remains a significant problem around the world, but how much of the problem is attributable to bad acts by U.S. companies is impossible to gauge with any degree of certainty. The best systems in the world aren't going to stop someone if they see it in their interest to violate the law and pay a bribe. So violations do occur, and we have matters under investigation now. The Justice Department is very diligent in their enforcement program and they are bringing significant cases in this area. As I mentioned, we brought the Triton case last year. So it's an area that I think deserves our continuing scrutiny. And when these cases are brought and the attendant publicity that they receive really I think gets the message out to American companies that this is an area they need to be sensitive to, and I think they are basically sensitive to it.

Mr. WHITE. Well thank you very much.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The Chair now recognizes the gentleman from Ohio, Mr. Sawyer, a recent co-sponsor of the legislation. We're glad to have you on board.

Mr. SAWYER. Thank you, Mr. Chairman. Well I'm glad to be on board and I'm grateful to you and the chairman of the full committee for your leadership on this issue, and I'm grateful to the administration for its international leadership on this issue. I think that people of good faith around the world are advocates of this kind of approach.

I would like to revisit a couple of the questions that both the chairman and the ranking member touched upon. Let me ask you about the European Union. Is it your belief that the European Union does not have the authority to undertake prohibitions of the kind that are involved in this treaty?

Mr. PINCUS. I don't think the European Union has competence over the individual countries' criminal laws. So I think it couldn't have done itself the specific criminalization of this kind of conduct that is part of one of the obligations of the Convention. This is a process that has been ongoing for some time in the OECD which, as you know, its a place where the countries are members in their individual status, but I think the EU has participated as an observer and, as I said, is interested and sees the benefits of transparency and of stamping out this conduct.

Mr. SAWYER. My view is that the European Union officials in general have been more supportive than the individual nation states, and I would hope that we could find ways to engage them in whatever measure of influence, however great or small, they may have over the law-making structures of their countries.

Let me ask you this. We talked about don't bribe me, bribe my party when you're talking about governmental officials, but we haven't talked much about the kind of circumstance, for example, that has arisen in Russia, don't bribe, bribe my corporate benefactor and the money will flow to me one way or another.

It seems to me that in placing the presumptive locus of decision largely in the hands of governmental officials that we miss a growing direction in which corruption flows, not from the government to companies, but in fact in the reverse direction. I would never oppose this legislation for its failure to do that, but do you foresee ways to undertake, or does this measure presume to undertake corruption that flows in that direction?

Mr. PINCUS. I think our view is that there would be little argument that that kind of payment would be covered. If the government official is the ultimate recipient of the money or at least a large chunk of it, and the goal of the giving of the money is to influence that official's action, I think the fact that it went through some circuitous route to get to him or her wouldn't make a difference in terms of it being covered by the Convention.

Mr. GERLACH. Congressman, I think what you have raised is really an issue of proof in conducting an investigation and proving up your case of a violation. In fact, the Triton case that I mentioned, precisely the scenario you just posited is what happened in that case. The company officials made payments to a local consultant, to his shell companies that he had set up. Money was funneled to the consultant and the company papered it over with what appeared to be legitimate business expenditures, which were a sham. The consultant then took those moneys received by his shell companies and directed payments to Indonesian Government officials.

So I think what you're pointing to is something that we think is squarely within the provisions of both the U.S. PATRIOT Act and would be permitted under the FISA framework, but it simply is one of the issues that makes these cases very difficult to investigate and get the evidence you need to prove a violation. I think it's more an issue of proof rather than it is an issue of the basis for liability.

Mr. SCOTT. So you believe it can't be covered, but it is just much more difficult to deal with?

Mr. [illegible]. Yes, sir.

Mr. SCOTT. Let me ask you a final question then. Mr. Markey and others have repeatedly raised questions of electronic commerce, and I notice that we fail does not mention people and entities in their function as communications entities. In a transactional organization when the commerce is itself electronic are there specific provisions that can be brought to bear in the case where the locus of the corruption is not in one place or another but is itself electronic in character?

Mr. [illegible]. I think actually, Congressman, that's an issue that doesn't just arise here, but really is something that we're going to confront more and more in other areas of the law, which is, what are the jurisdictional limits and what is our ability to exercise jurisdiction over conduct that occurs in cyberspace and geographically is neither here nor there. I think that's something that we're going to have to work out with civil and criminal jurisdiction. Generally, I don't think this answers it and I don't think it adds that much to it.

One of the benefits is that at least with respect to the jurisdiction over U.S. nationals, because their conduct is covered, or after the legislation is enacted will be covered, both domestically and abroad, any action really is covered anywhere. So the enhancement of jurisdiction should go to answering that question, at least with respect to U.S. nationals, because the SEC and the Justice Department are going to have very broad jurisdiction there.

Mr. SCOTT. Well the answers or lack of them to these three questions do in no way diminish my enthusiasm for the undertaking, and I raise them only because they're likely to occur in practice.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Massachusetts who is an original co-sponsor of this legislation and one who has taken the lead on this issue for a number of years is recognized for a round of questions.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Mr. Chairman, I ask unanimous consent that a letter in support of quick action by the Congress to implement the Convention by the Secretaries of State, Treasury, Commerce, the Attorney General, the Chairman of the Securities and Exchange Commission and the USTR be entered into the record at this hearing, and I add to that request that a letter from the Business Roundtable in support of quick implementation, a resolution approved by the American Bar Association and an editorial from the Washington Post also be entered into the record.

Mr. OXLEY. Without objection.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

[The material follows.]

JUN 9 1998

Dear Mr. Chairman:

We would like to voice our shared support for swift Congressional approval of the recently-submitted Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its related implementing legislation. This Convention, which was signed in December of last year at the Organization for Economic Cooperation and Development (OECD), is extremely important for the United States. It fulfills a desire expressed by the Congress in the Omnibus Trade and Competitiveness Act of 1988 that the United States Government seek from our OECD partners enactment of criminal prohibitions on foreign corrupt practices. The Convention is the culmination of efforts by this and previous Administrations.

Since 1977, when Congress enacted the Foreign Corrupt Practices Act (FCPA), the United States has been the only country to criminalize effectively the bribery of foreign public officials. Now, for the first time, the United States and its major trading partners have agreed upon an international Convention which obligates the world's largest economies to make it a crime to bribe the officials of other countries in international business transactions. This is a major contribution to the international rule of law and the promotion of democratic values of which we should all be proud. It will combat the damage which bribery causes to economic development efforts and to U.S. exporters.

We and the other 32 signatory countries have agreed to the ambitious goal of seeking adoption of necessary legislation to implement the Convention by the end of this year. It is essential that the United States meet this schedule, in order to continue U.S. leadership on this important issue and to encourage other countries to implement fully the agreement.

While the Convention tracks the FCPA closely, we have proposed certain amendments to bring our law into full compliance with the obligations of and to implement the Convention. We have been working with the business community and with interested non-governmental organizations in this effort, and have sought in the implementing legislation to ensure that U.S. firms will face disciplines comparable to those of foreign firms as a result of this agreement. When implemented and enforced by parties, the Convention will go a long way towards reducing incidents of bribery in international business transactions.

We urge the Congress to act quickly to ensure that U.S. firms and their employees can realize the benefits of this Convention as soon as possible.

Sincerely,

Robert E. Rubin
Secretary of the Treasury

Madeleine K. Albright
Secretary of State

Janet Reno
Attorney General

William M. Daley
Secretary of Commerce

Charlene Barshefsky
United States Trade Representative

Arthur Levitt
Chairman
Securities and Exchange Commission

THE BUSINESS ROUNDTABLE

Chairman
Donald V. Fites
Caterpillar

Cochairmen
Ralph S. Larsen
Johnson & Johnson

Walter V. Shipley
Chase Manhattan

John F. Smith Jr.
General Motors

1615 L Street, N.W.
Suite 1100
Washington, D.C. 20036-5610
Tel (202) 872-1260
Fax (202) 466-3509
Web www.brtable.org

Samuel L. Maury
President

Patricia Hanahan Engman
Executive Director

May 28, 1998

The Honorable Don Young
U.S. House of Representatives
2111 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Young:

We are writing to express our support for the speedy ratification and implementation of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that the Administration has just submitted to the Congress.

The OECD Convention is a major victory for the United States in its battle against international corruption and bribery. It creates an international antibribery system that obligates signatory countries to adopt domestic laws to combat foreign bribery. Since the Foreign Corrupt Practices Act (FCPA) was adopted in 1977, the United States has tried to persuade our major trading partners to enact comparable laws. In the 1988 Omnibus Trade Act, the Congress directed the President to negotiate an international agreement in the OECD on the prohibition of overseas bribes. After years of negotiation, the United States has succeeded in getting thirty-three other countries (all the OECD members and five non-members) to join the United States in the Convention.

The Congress, current and past Administrations, and the private sector have made their fight against international bribery and corruption a priority because international corruption undermines important U.S. goals of (1) achieving a level playing field for those U.S. companies and their workers that compete overseas, (2) fostering economic development and trade liberalization, and (3) promoting democracy and democratic institutions. The Department of Commerce has estimated that between 1994 and 1996, there were at least 100 cases of foreign firms using bribery to undercut U.S. firms' efforts to win international contracts, costing our companies over $45 billion. The OECD Convention is designed to eliminate these trade distorting activities and make foreign bribery a crime in major trading countries.

Speedy ratification and implementation of the OECD Convention by the United States is, however, an absolute imperative in order for the Convention to succeed. Some of the other parties are not as committed to the Convention as the United States and are likely to use a delay in U.S. ratification to undermine it. Speedy implementation of the OECD Convention is also necessary to show the other parties that the United States takes its obligations under the Convention seriously and expects other parties to do the same. Since the Convention's effectiveness depends on the adoption of international antibribery laws by the other parties, implementation by the United States is necessary to lead the way, substantively and politically, for implementation of the Convention by other parties.

Enclosed, for your information, is background material on the OECD Convention and a summary of the amendments necessary to bring the FCPA into compliance with the OECD Convention.

We are committed to working with you to help protect U.S. businesses and workers from unfair and corrupt foreign competition through the ratification and implementation of the OECD Antibribery Convention by the Congress this year.

Sincerely,

Peter S. Janson
President & CEO
ABB Inc.

Harold A. Wagner
Chairman, President & CEO
Air Products and Chemicals, Inc.

Lawrence A. Bossidy
Chairman & CEO
AlliedSignal, Inc.

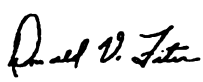
Maurice R. Greenberg
Chairman & CEO
American International Group, Inc.

William J. Hudson Jr.
President & CEO
AMP Incorporated

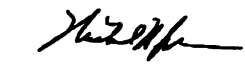
C. Michael Armstrong
Chairman & CEO
AT&T

Curtis H. Barnette
Chairman & CEO
Bethlehem Steel Corporation

Ernest S. Micek
Chairman, President & CEO
Cargill, Inc.



Donald V. Fites
Chairman & CEO
Caterpillar Inc.



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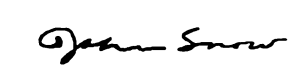
Chairman & CEO
CBS Corporation

Robert J. Eaton
Chairman, President & CEO
Chrysler Corporation



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William E. Bradford
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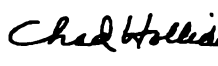
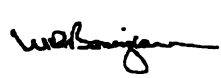


Charles O. Holliday
President & CEO
DuPont Company

George M. C. Fisher
Chairman & CEO
Eastman Kodak Company

Richard J. Swift
Chairman, President & CEO
Foster Wheeler Corporation

John F. Welch Jr.
Chairman & CEO
General Electric Company



Michael R. Bonsignore
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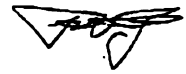
James E. Perrella
Chairman, President & CEO
Ingersoll-Rand Company

D. T. Engen
Chairman, President & CEO
ITT Industries, Inc.



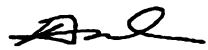
Raymond V. Gilmartin
Chairman, President & CEO
Merck & Company, Inc.

Larry D. Yost
Chairman & CEO
Meritor Automotive, Inc.

W. Wayne Allen
Chairman & CEO
Phillips Petroleum Company

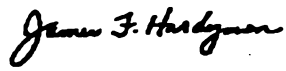
Dennis J. Picard
Chairman & CEO
Raytheon Company

D. H. Davis Jr.
Chairman & CEO
Rockwell International Corporation



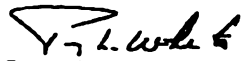
Dean G. Mead
Chairman & CEO
Tenneco

Thomas J. Engibous
President & CEO
Texas Instruments Incorporated



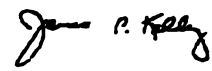
James F. Hardymon
Chairman & CEO
Textron Incorporated

Philip M. Condit
Chairman, President & CEO
The Boeing Company



Tony L. White
Chairman & CEO
The Fluor Corporation

Joseph T. Gorman
Chairman & CEO
TRW Inc.



James P. Kelly
Chairman & CEO
United Parcel Service of America

George David
Chairman, President & CEO
United Technologies Corporation

John A. Luke Jr.
Chairman & CEO
Westvaco

Enclosures

WHAT IS THE OECD ANTIBRIBERY CONVENTION?

- **The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions creates an international antibribery system that obligates signatory countries to enact domestic laws to combat foreign bribery.**
  - The United States, which has had such a law since 1977, will no longer be alone once the Convention is ratified and implemented by the parties.
  - Thirty-three countries have joined this historic Convention. Those countries included the 29 OECD members (United States, U.K., Japan, Canada, France, Germany, Italy, Korea, Mexico, Switzerland, Australia, Austria, Belgium, Czech Republic, Denmark, Finland, Greece, Hungary, Iceland, Ireland, Luxemburg, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Turkey) and five other nations (Argentina, Brazil, Bulgaria, Chile and the Slovak Republic).
  - The OECD Convention will level the international trade playing field since our major trading partners are now obligated to enact foreign antibribery laws.
- **Similarly to the Foreign Corrupt Practices Act ("FCPA"), the OECD Convention –**
  - *provides* that parties shall make it a crime "for any person intentionally to offer, promise or give any undue pecuniary or other advantage . . . to a foreign public official . . . in order to obtain or retain business or other improper advantage in the conduct of international business;"
  - *applies* to corrupt payments to office-holders, legislators, and personnel of government-controlled companies (so-called "parastatals");
  - *recognizes* an exemption for small "facilitating payments;" and
  - *requires* parties to enact accounting requirements for the purpose of preventing false or misleading accounting practices that can be used to bribe or to hide such bribery.
- **In order to ensure full and effective implementation, the OECD Convention also requires that the parties to the OECD Convention -**
  - *review* their current basis for jurisdiction and take remedial steps if they are not effective in the fight against bribery;
  - *consult* when more than one party asserts jurisdiction;
  - *provide* legal assistance to each other relating to investigations and proceedings and make bribery of foreign officials an extraditable offense; and
  - *cooperate* in a follow-up program in the OECD to monitor compliance with the Convention.
- **The parties to the OECD Convention have already agreed to an accelerated work plan to address several outstanding issues related to the Convention, including acts of bribery relating to foreign political parties, and coverage of foreign subsidiaries.**

THE OECD ANTIBRIBERY CONVENTION
SUMMARY OF PROPOSED LEGISLATIVE CHANGES
TO THE FOREIGN CORRUPT PRACTICES ACT

The following five amendments to the Foreign Corrupt Practices Act ("FCPA") are needed to implement the recently-signed OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:

***First*, an amendment to expand the scope of the FCPA to include payments made to secure "any improper advantage."**

(The OECD Convention requires parties to cover payments made to "obtain or retain business or other improper advantage in the conduct of international business." While the FCPA has been interpreted broadly to include this, the amendment is necessary to ensure that the other parties do not doubt U.S. implementation of the Convention.)

***Second*, an amendment to expand the scope of the FCPA to cover foreign persons for acts committed while in the United States.**

(The OECD convention requires parties to cover prohibited acts by "any person." The FCPA currently covers only issuers, as defined in the 1934 Securities Exchange Act, and domestic concerns.

***Third*, an amendment to expand the FCPA definition of foreign official to include officials of public international organizations.**

(The OECD Convention, unlike the current FCPA, includes officials of international agencies within the definition of foreign public official.)

***Fourth*, an amendment to provide for jurisdiction over the acts of U.S. persons that take place wholly outside the United States.**

(The OECD Convention calls on parties to prosecute their nationals for offenses committed abroad. The FCPA currently covers only issuers as defined in the 1934 Securities Exchange Act, and domestic concerns who use the mails or other means of interstate commerce.)

***Fifth*, an amendment to the FCPA's penalty sections relating to issuers and domestic concerns to ensure that penalties for non-U.S. citizen employees and agents of issuers and domestic concerns accord with those of U.S. citizen employees and agents.**

(Under the current FCPA, non-U.S. citizen employees and agents of issuers and domestic concerns are subject only to civil, rather than criminal, penalties.)

This package of amendments will bring the FCPA into conformity with the OECD Convention and lead the way for implementation of the OECD Convention by the other parties.

THE OECD ANTIBRIBERY CONVENTION
A U.S. VICTORY OVER INTERNATIONAL CORRUPTION

- **The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is a major victory for the United States in its battle against international bribery and corruption.**
  - Since the Foreign Corrupt Practices Act ("FCPA") was adopted in 1977, the United States alone has prohibited foreign bribery.
  - Without U.S. leadership and perseverance, 33 other countries would not have joined the OECD Convention on December 17, 1997.
- **The OECD Convention is the result of bipartisan cooperation and the collaborative efforts of the Congress, the Executive Branch and the private sector.**
  - In the 1988 Omnibus Trade Act, the Congress directed the President to negotiate an international agreement in the OECD on the prohibition of overseas bribes.
- **The OECD Convention will level the international trade playing field.**
  - The U.S. Department of Commerce estimates that between 1994 and 1996 there have been almost 100 cases of foreign firms using bribery to undercut U.S. firms' efforts to win international contracts worth over $45 billion.
- **Speedy ratification of the OECD Convention is needed to persuade other parties to ratify the Convention quickly.**
  - Some of the other parties are not as committed to the Convention as the United States and are likely to use a delay in U.S. ratification to undermine the Convention.
- **Speedy implementation of the OECD Convention is also necessary to show the other parties that the United States takes its obligations under the Convention seriously and expects other parties to do the same.**
  - Since the Convention's effectiveness depends on the adoption of international antibribery laws by the other parties, implementation by the United States is necessary to lead the way, substantively and politically, for implementation of the Convention by the other parties.
- **Because the FCPA is already in force in the United States, only minor amendments are necessary to bring it into line with the OECD Convention.**
  - A summary of proposed legislative changes to the FCPA is attached.

AMERICAN BAR ASSOCIATION
SECTION OF
INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION

RESOLVED, That the American Bar Association supports the prompt ratification and implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) by the United States, by other members of the Organization for Economic Co-operation and Development (OECD), and by other countries that are eligible to accede to the OECD Convention.

FURTHER RESOLVED, That the American Bar Association urges

1) that such ratification be subject to minimal reservations and understandings; and

2) that such implementation be full, effective and consistent.

FURTHER RESOLVED, That the American Bar Association supports the prompt enactment of the legislative changes proposed by the Administration to conform the Foreign Corrupt Practices Act to the OECD Convention.

FURTHER RESOLVED, That to assure consistency and effectiveness, the American Bar Association supports, through the OECD and other fora, meaningful and ongoing efforts to monitor the effective and consistent implementation and enforcement of the OECD Convention as well as continuing efforts to further develop the OECD Convention so as to establish the most effective means for deterring corrupt practices in the conduct of international business.

Passed August 4, 1998
By ABA House of Delegates

C6 SUNDAY, MAY 10, 1998

The Washington Post

AN INDEPENDENT NEWSPAPER

A Treaty Against Bribes

HOW'S THIS for a level playing field? U.S. law bans the bribery of foreign officials to win business contracts; French law makes such bribes tax-deductible. For years, the United States has been urging other industrialized countries to erase this discrepancy—to outlaw foreign bribery, as has U.S. law for more than two decades. Now Congress has a chance to help make that happen.

The instrument at hand is the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials, which 33 leading developed nations signed last December. Once the treaty goes into effect, every participating country will criminalize bribery of foreign officials. In some ways, the treaty doesn't go as far as the U.S. Foreign Corrupt Practices Act nor as far as U.S. negotiators would have liked. It doesn't ban payments to political parties or candidates, for example. But it's a huge first step, and other nations have agreed to discuss extending its reach once this treaty goes into effect.

The United States has nothing to lose by ratifying the covenant; it essentially confirms U.S. law. Exactly 10 years ago Congress instructed the executive branch to seek just such a treaty. The only question is whether the Senate will find time to vote on it, and whether both houses of Congress will find time to pass the necessary implementing legislation before everyone goes home to campaign. But timing is urgent. The signatories promised maximum effort to ratify by the end of this year. Any delay here would only give other countries an excuse to deviate from that schedule.

Corruption exists in all countries, and no doubt always will. But in developing nations, and those making a transition from communism to free market, corruption can have an especially debilitating effect. Such countries often lack established courts and law enforcement institutions to keep bribery in check. When ruling elites skim huge portions of incoming investment, they impoverish everyone else while fostering cynicism and a sense that anyone who is honest is also a sap. It's important that all developed countries recognize, as the United States has since 1977, that they have a responsibility to help fight such destructive dishonesty. And once the treaty comes into force, European bribes will not only no longer be legal—they won't be tax-deductible, either. That's one more reason for Congress to act fast.

Mr. MARKEY. Mr. Pincus, welcome. It's good to see you again. On page 2 of your testimony you noted that while the FPCA covers bribes paid to foreign political parties, foreign party officials or candidates for political office the Convention covers such bribes only if they are used to direct payments to foreign government officials, or if such officials direct that such payments be made to a party, party official or candidate for political office. Why were we unsuccessful in securing agreement in the Convention to cover all bribes to parties, party officials or candidates?

Mr. PINCUS. Frankly, it was one of the issues that we pushed hard on, but we just could not get our colleagues in the OECD to go along with. There was concern about drawing the line between contributions, what would be a lawful contribution and what would

be a bribe and how that definition would be made to work in the laws of various countries. What we did get, though, was an agreement to keep it on the agenda and to have a full discussion of it next May at the Ministerial Conference, and it's something I can tell you that Secretary Daley feels very strongly about pushing.

Mr. MARKEY. In your opinion what is the greatest missed opportunity? What is the one additional protection which you would ask for?

Mr. PINCUS. Well, first of all, I don't want my answer to indicate that the glass is half full because I think this Convention has made enormous strides.

Mr. MARKEY. I'm giving you full credit for the great job you've done. We're into a mea culpa era here. So I just wanted to know is there one additional thing that you would have tried to get?

Mr. PINCUS. I think the political party issue is, in our view, an important issue. Obviously it varies from country to country, but parties have a close relationship with government officials and we certainly don't want there to be a loophole. It's one of the reasons why we insisted that there be follow-up discussions, and a formal designation of this as an issue for follow-up discussions, because it's one that we want to continue to work on. Although there are a lot of technicalities because of the contribution angle, it's an issue that we really want to work on and get a resolution of.

Mr. MARKEY. In view of the fact that the OECD nations apparently were unwilling to agree to such language, what gives you confidence that in the future they will accept language that is effective?

Mr. PINCUS. Well just to step back for a minute, I think one of the things that has worked throughout this whole process, which has really been a many-year process of working to bring other countries around to the idea that transparency is an important value that has to be fostered, is the growing pressure in those countries themselves domestically from their business communities and from their citizens that bribing is something that should not be permitted and that their governments should take action against it. So I think that's an important factor.

The agreement that we have in the OECD is not only to begin discussions of it, but to complete discussions on a fairly quick timetable. So I think we are hopeful that having the formal start of discussions and having a timetable for conclusion will give us a hammer where people won't want to go back home and say, oh, it's okay to bribe political parties. They're going to want to come to some solution.

Mr. MARKEY. Our legislation includes a reporting requirement on implementation of the Convention. Would the administration support an amendment to this reporting requirement that mandated that you periodically report to Congress on the progress made to secure agreements to extend the Convention to fully cover bribes paid to foreign political parties, foreign party officials or foreign candidates for political office?

Mr. PINCUS. Certainly. We would be happy to support that.

Mr. MARKEY. Thank you. I also see from the testimony that one of the OECD member states, Australia, has failed to sign the Convention. In addition, there are other nations such as Russia and

China who are not members of the OECD and have not signed the Convention. What is being done to secure the agreement of Australia to the Convention and to get the other key foreign nations to sign the Convention?

Mr. PINCUS. We very much view the Convention as a first step and an important step, but just a first step in working on this issue around the world, and Secretary Daley and his counterparts when they meet with their counterparts around the world will always place this high on the agenda as something to work on.

Specifically with respect to the Asian nations, we are working to put the whole issue of combating bribery and corruption on the agenda of the Asian Pacific Economic Cooperation Forum meeting this November and to get those countries to agree to steps. There may be different issues there because in those countries it's probably worth discussing both the demand side, the recipient side, as well the payment side, but we are working to get this issue high up on the agenda there and get similar protections in place.

Mr. MARKEY. And if Russia joins OECD are they automatically part of the Convention, or do they have to do something affirmatively in addition in order to join the Convention?

Mr. PINCUS. They have to agree to sign onto the Convention through whatever their process is.

Mr. MARKEY. Would the administration support addition language to the reporting requirements established in the Chairman's bill to mandate periodic reports on efforts to secure the signature of additional countries to the Anti-Bribery Convention?

Mr. PINCUS. Yes.

Mr. MARKEY. Thank you.

And, finally, Mr. Gerlach, has Congress ever taken any action to increase the civil or criminal penalties for violation of the FCPA since the time this law was first enacted some 20 years ago?

Mr. GERLACH. Off the top of my head I'm not aware that there has been action taken.

Mr. MARKEY. Should we consider increasing civil penalties or criminal penalties?

Mr. GERLACH. It might be something that you might want to consider. Obviously inflation has occurred in 20 years and it may be something you may wish to revisit.

Mr. MARKEY. Thank you.

Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman from Massachusetts for his leadership on this issue.

And we thank both of our witnesses for your testimony.

The Chair would note that my friend from Massachusetts, before he leaves, might recall as long as 10 or 12 years ago we dealt with this issue when our good friend Tim Wirth was chairman of the subcommittee, but it was in a lot different context. It was in the context in which we were passing the bill without the rest of the world participating. So we were in many ways tying the hands of our own companies at the expense of their ability to create jobs and profits.

Now with the Convention we have a whole different situation before us which makes our job obviously easier in many respects, and

it also puts it in a much more attractive context as far as the rest of the world hopefully following our lead in anti-bribery legislation.

So we thank both of you for your participation. This is an ongoing process. As you indicated, Mr. Pincus, this is a good beginning, but indeed a first step toward our ultimate goal.

So, again, thank you.

With that, the subcommittee stands adjourned.

[The subcommittee adjourned at 12:07 p.m., subject to the call of the Chair.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF JAMES W. CUMINALE, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, PANAMSAT CORPORATION

My name is James W. Cuminale. I am the Senior Vice-President and General Counsel of PanAmSat Corporation. I am pleased to submit this statement on one aspect of H.R. 4353, The International Anti-Bribery And Fair Competition Act Of 1998, which is the problem of the expansive immunities of the international satellite communications companies, Intelsat and Inmarsat.

PanAmSat has competed with Intelsat for over a decade, and knows first-hand the problems caused by an entity providing commercial services under the cloak of diplomatic immunities. These immunities include exemption from legal process and regulatory oversight. They distinguish Intelsat and Inmarsat from any private commercial competitor and are one of the principal "tilts" in the unlevel playing field.

Perhaps even worse, the U.S. Signatory to both organizations, Comsat, enjoys immunity, even though it is a publicly-traded, commercial company. The FCC has stated that "unlike any of its competitors, Comsat uniquely benefits from immunity from suit and legal process in the U.S. arising from its status as the U.S. Signatory to INTELSAT. Comsat's immunity gives it an incentive to engage in potentially anticompetitive behavior either unilaterally or with other market participants." See FCC Order in the Matter of Comsat Petition for Forbearance from Non-Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, ¶155 (1998). The FCC suggested that Comsat should make an appropriate waiver its immunity if it wanted to use Intelsat to serve the U.S. domestic telecom market and Comsat took the Commission to court rather than waive any aspect of its immunity.

Let me give you a very real example of how this immunity works. When PanAmSat became the first company to receive a license from the FCC to compete against Intelsat, Intelsat struck back. For three years in a row, its Signatories unanimously passed resolutions agreeing to boycott any competing satellite systems. Comsat participated in this boycott resolution, even though this was contrary to U.S. policy. The boycott almost killed PanAmSat in its cradle. In fact when our first satellite was launched four years after the boycott resolution, it went up without a single customer.

It is rare in an antitrust case that you find such an obvious "smoking gun" as Intelsat"s boycott resolution. However, the courts found that the boycott resolution could not be entered into evidence, as it was protected by Comsat's immunity for actions taken as a Signatory. This immunity comes from the Headquarters Agreement that the United States, as Intelsat's host country, entered into with Intelsat. *See Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168 (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3578 (Feb. 24, 1992); 968 F. Supp. 876 (S.D.N.Y. 1996), *aff'd*, 113 F.3d 372 (2d Cir. 1997). When a commercial boycott can be protected under Intelsat immunity, it shows that the courts' distinction between Signatory and common carrier activities is not tenable.

How did we get to this position?

The Intelsat Agreement provides only limited guidance as to the scope of immunity that was intended for Intelsat and its officials. Article XV(c) states that the Party in whose territory Intelsat's headquarters is located (*i.e.*, the United States) shall grant privileges, exemptions and immunities "in accordance with the Headquarters Agreement," and that the other Parties shall make a grant "in accordance with the [privileges, exemptions and immunities] Protocol." Article XV(c) does not, however, specify what the privileges, exemptions and immunities should be, other than to state that they should be "appropriate," and that, as to "immunity from legal process in respect of acts done or words written or spoken in the exercise of [officers" and employees"] duties," the privileges, exemptions and immunities should be "to the extent and in the cases to be provided for in the Headquarters Agreement and Protocol."

The Headquarters Agreement also leaves this question largely unanswered: to what extent Intelsat and its officials are immune from suit or legal process? Section 16 of the HQ Agreement affords immunity "from suit and legal process" to "[t]he officers and employees of Intelsat, the representatives of the Parties and of the Signatories and persons participating in arbitration proceedings pursuant to the Intelsat Agreement." This immunity, however, is limited to "acts performed by them in their official capacity and falling within their functions," and Section 16 does not elaborate upon the intended meaning of those terms.

The best evidence of what was intended can be found in the International Organization Immunity Act ("IOIA"), which (through an implementing Executive Order) provides immunity to Intelsat under U.S. law, and the Protocol, which implements the same immunity language in Article XV(c) of the Intelsat Agreement for countries belonging to Intelsat other than the United States as the HQ Agreement does for purposes of Intelsat immunity within the United States. Both sources—the IOIA and the Protocol—suggest that Intelsat and its officials lack immunity in connection with Intelsat's commercial activities.

In 1945, in anticipation of the establishment of the United Nations, Congress passed the International Organization Immunity Act ("IOIA"), which granted to designated international organizations the same immunities as those granted to "foreign governments." 22 U.S.C. §§ 288 *et seq*. At that time, the immunity granted to foreign governments was absolute and drew no distinction between commercial and governmental activities. The IOIA does, however, provide that the President may restrict the immunity of any particular organization. The reason for this reservation of right was to "permit the adjustment or limitation of the privileges in the event that any international organization should engage, for example, *in activities of a commercial nature*." S. Rep. No. 861, 79th Cong., 1st Sess. 4 (1945) (emphasis added).

A 1973 executive order designated Intelsat as an international organization for purposes of the IOIA. Executive Order 11718, 38 Fed. Reg. 12797 (1973). In 1976, in the month preceding the execution of the HQ Agreement, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), which codified the "commercial activities" exception to the IOIA. 28 U.S.C. §§ 1602 *et seq*. FSIA provides that foreign governments are not immune for any "action [that] is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that the act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). In 1977, President Ford issued an executive order revoking the pre-FSIA 1973 executive order and re-designating Intelsat as an international organization for purposes of the IOIA. 42 Fed. Reg. 4331 (Jan. 19, 1977).

Thus, the immunities of international organizations under IOIA must be coterminous with those afforded foreign governments under FSIA, pursuant to which foreign governments have no immunity for their commercial activities. With respect to IOIA immunity, therefore, Intelsat should not be immune from suit or legal process on the basis of its commercial activities.

If Intelsat already does not enjoy immunity from suit for its commercial activities under the HQ Agreement and the IOIA as modified by the FSIA, then why is it necessary to enact Section 5(b)?

In addition to narrowing the overbroad decision in *Alpha Lyracom* (see above), Section 5(b) resolves an issue that has not been resolved by the courts. The U.S. government has taken the position that the FSIA did eliminate immunity from suit under the IOIA for commercial activities, but no court has resolved the issue definitively. The federal government went on record in favor of this position in *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980). In its brief in that case, the United States argued:

> [T]here can be, we submit, no question that since the passage two years ago of the Immunities Act [FSIA], international organizations are now fully subject to suits in American courts for their acts *jure gestonis* [*i.e.*, for their commercial activities]. The suggestion advanced below by the *amici* [Intelsat] that the International Organization Immunity Act somehow ossified in 1945 the doctrine of absolute foreign sovereign immunity with respect to international organizations is devoid of substance.

Brief for the United States, *Broadbent v. OAS*, 628 F.2d 27 (D.C. Cir. 1980), filed Oct. 18, 1978.

The court, although it determined that it did not need to resolve the issue of the effect of the FSIA on the IOIA, noted that the position of the United States was supported by the doctrine that "ordinarily, [a] statute which refers to the law of a

subject generally adopts the law on the subject as of the time the law was invoked... including all the amendments and modifications of the law subsequent to the time the referenced statute was enacted." *Broadbent*, 628 F.2d at 31. Since that time, the United States Department of State has indicated that it concurs with the views expressed in *Broadbent* by the United States Department of Justice.

Accordingly, in the context of international organizations providing communications services, Section 5(b) clarifies that post-FSIA, international organizations do not have immunity from suit or legal process under the IOIA in connection with their commercial activities.

I urge you to pass The International Anti-Bribery And Fair Competition Act Of 1998 with its provision to extend legal process to Intelsat and Inmarsat. This will rectify a persistent problem that has negatively affected the growth of competition in international satellite telecommunications.

UNITED STATES DEPARTMENT OF COMMERCE
WASHINGTON, DC
September 16, 1998

The Honorable JOHN DINGELL
Ranking Minority Member
Committee on Commerce, House of Representatives
Washington, DC 20515-6115

DEAR REPRESENTATIVE DINGELL: I appreciated the opportunity to appear before the House Subcommittee on Finance and hazardous Materials in support of H.R. 4353, the International Antibribery and Fair Competition Act of 1998. During the course of the hearing you posed two questions to which I agreed to respond in writing.

First, you asked me whether the international satellite provisions of H.R. 4353 were needed to implement the OECD Antibribery Convention. The Administration draft bill contains those provisions that we deem necessary to implement the Antibribery Convention.

You also inquired whether anything in the international satellite provisions of H.R. 4353 affects the privileges and immunities of COMSAT, such as immunities that might be available to COMSAT in antitrust litigation. It is my understanding that these provisions would not alter COMSAT's privileges and immunities. When COMSAT acts as U.S. signatory to international satellite organizations it is entitled to certain privileges and immunities as the designated representative of the United States. When COMSAT acts outside its role as U.S. signatory to international satellite organizations, it is not entitled to such privileges and immunities. This will not change under H.R. 4353.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

ANDREW J. PINCUS
General Counsel

cc: The Honorable Tom Bliley
The Honorable Michael G. Oxley
The Honorable Thomas J. Manton

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